DOCKET

No. 13-9972

Title:	Dennys Rodriguez, Petitioner
	v.
	United States
Docketed:	May 2, 2014
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(13-1176)
Decision Date:	January 31, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
May 1 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 2, 2014)
May 28 2014	Order extending time to file response to petition to and including July 2, 2014.
Jun 13 2014	Order further extending time to file response to petition to and including August 1, 2014.
Jul 22 2014	Brief of respondent United States in opposition filed.
Aug 7 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 17 2014	Brief of petitioner Dennys Rodriguez filed.
Nov 17 2014	Joint appendix filed.
Nov 21 2014	SET FOR ARGUMENT ON Wednesday, January 21, 2015
Nov 24 2014	Brief amici curiae of U.S. Justice Foundation, et al. filed.
Dec 2 2014	Record requested from U.S.C.A. 8th Circuit.
Dec 12 2014	CIRCULATED.
Dec 17 2014	Brief of respondent United States filed. (Distributed)
Dec 23 2014	Brief amici curiae of States of Illinois, et al., filed. (Distributed)
Jan 13 2015	Reply of petitioner Dennys Rodriguez filed. (Distributed)
Jan 21 2015	Argued. For petitioner: Shannon P. O'Connor, First Assistant Federal Public Defender, Omaha, Neb. For respondent: Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 21 2015	Judgment VACATED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Breyer, Sotomayor, and Kagan, JJ., joined. Kennedy, J., filed a dissenting opinion. Thomas, J., filed a dissenting opinion, in which Alito, J., joined, and in which Kennedy, J., joined as to all but Part III. Alito, J., filed a dissenting opinion.
May 26 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

This Court has held that, during an otherwise lawful traffic stop, asking a driver to exit a vehicle, conducting a drug sniff with a trained canine, or asking a few off-topic questions are "de minimis" intrusions on personal liberty that do not require reasonable suspicion of criminal activity in order to comport with the Fourth Amendment. This case poses the question of whether the same rule applies after the conclusion of the traffic stop, so that an officer may extend the already-completed stop for a canine sniff without reasonable suspicion or other lawful justification.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Dennys Rodriguez respectfully petitions the Court for a writ of certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Eighth Circuit on January 31, 2014.

Opinions Below

The decision of the United States Court of Appeals affirming Rodriguez's conviction can be found at United States v. Rodriguez, 741 F.3d 905 (8th Cir. Jan. 31, 2014). A copy of the Eighth Circuit's opinion is appended to this Petition. (App. 1A) The District Court's Memorandum and Order is unpublished, but a copy of that Order is also contained in the Appendix. (App. 4A). The Magistrate Judge issued its Report and Recommendation from the bench. Its findings, and the Order accompanying it, are attached to this petition. (App. 9A)

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit was entered on January

31, 2014. (App. 1A) Rodriguez invokes this Court's jurisdiction under 28 U.S.C. §1254(a), having timely filed this petition for a writ of certiorari within ninety days of the Court of Appeal's Judgment.

Constitutional Provisions Involved

Dennys Rodriguez's Petition for a Writ of Certiorari involves the Fourth Amendment's right to be free from unreasonable searches and seizures:

> **U.S. Const. Amend. IV**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

Over the years, this Court has addressed what actions law enforcement officers may constitutionally undertake within the confines of a lawful traffic stop. In Pennsylvania v. Mimms, 434 U.S. 106 (1977), the Court held that an officer may ask a driver to step out of the car during the encounter. The Court held in Illinois v. Caballes, 543 U.S. 405, 408 (2005), that an officer may also deploy a drug-detection dog to sniff the outside of a vehicle during an otherwise-legitimate traffic stop. In Muehler v. Mena, 544 U.S. 93, 101 (2005), the Court held that an officer may inquire briefly into matters unrelated to the justification for the traffic stop without possessing reasonable suspicion of criminal activity.

A common caveat accompanied each of these cases: an expectation that the action taken by the officer would not meaningfully extend the otherwise-legitimate stop

or unduly intrude on a driver's personal liberty. See Mimms, 434 U.S. at 111; Caballes, 543 U.S. at 408-09; Muehler, 544 U.S. at 101. In the words of Mimms, these actions are permissible because none accounts for more than *"de minimis"* additional intrusion during an otherwise-justified stop. Mimms, 434 U.S. at 111.

The question presented in this case is whether the same justification can be used to uphold law enforcement actions that occur *after* the conclusion of the lawful traffic detention or whether, once the stop ends, an officer must have reasonable suspicion to take any of the steps that have so far been ratified by this Court.

1. The traffic stop

Dennys Rodriguez and his passenger, Scott Pollman, were driving home from Omaha, Nebraska to Norfolk, Nebraska just after midnight on March 27, 2012. They had been in Omaha to investigate the possibility of purchasing an older-model Mustang, but decided against buying the car when the owner could not produce the title. As Rodriguez was driving, he briefly crossed the fog line and drifted onto the shoulder of the road. Officer Morgan Struble of the Valley, Nebraska Police Department saw Rodriguez drive onto the shoulder and decided to stop Rodriguez for a traffic violation. He pulled Rodriguez's vehicle over at approximately 12:06 a.m.

As Officer Struble approached Rodriguez's vehicle from the passenger's side, he noticed a strong but pleasant odor of air freshener. At the vehicle, he spoke first with Rodriguez. He requested Rodriguez's license, registration, and proof of insurance, and asked why Rodriguez had driven onto the shoulder. Rodriguez said he had swerved to avoid a pothole, and seemed agitated when Officer Struble informed him that crossing

the white line was a traffic violation.

Officer Struble asked Rodriguez to accompany him to his patrol car so that the officer could complete some paperwork. Rodriguez asked if he was obligated to leave his car. When Officer Struble said "no," Rodriguez said he would rather just sit in his own vehicle. Officer Struble found Rodriguez's response suspicious, as he believed that was a sign that the vehicle might contain contraband.

Officer Struble returned to his cruiser and called in a request for a records check on Rodriguez. He then returned to Rodriguez's vehicle and began talking with the passenger, Scott Pollman. Officer Struble had noticed from the outset of the traffic stop that Pollman seemed nervous. Pollman wore his cap low over his eyes, was smoking a cigarette and avoided eye contact with Struble. As he talked with Pollman, Officer Struble's suspicion grew. Pollman said they had not viewed any pictures of the Ford Mustang they were thinking of purchasing before making the two-hour trip to Omaha to see the car. Since this is not something Officer Struble would do, Officer Struble found that strange.

After obtaining Pollman's driver's license, Struble again returned to his cruiser. It was 12:19 a.m.–about 13 minutes into the traffic stop. By this time, because of his suspicions, Officer Struble had decided to walk a drug-detection dog around Rodriguez's vehicle. Struble had the canine in his car, but felt he needed a second officer as a backup for officer safety reasons. Officer Struble requested a records check on Struble's license, and then contacted a second officer. Officer Struble then began writing a warning ticket for Rodriguez.

Officer Struble returned to Rodriguez's vehicle for a third time, where he returned

all of the documents to Rodriguez and Poliman. Officer Struble then issued a written warning to Rodriguez for driving on the shoulder of the road. Officer Struble completed the warning at 12:25 a.m. and said he gave it to Rodriguez a minute or two later. At that time, all parties agree that the initial traffic detention had concluded. Nevertheless, Officer Struble did not allow Rodriguez to leave. Instead, as the government explained at the motion to suppress hearing, Officer Struble "detained [Rodriguez] for another officer to arrive." (Tr. 49, 69: 20-24)

While waiting for the other officer, Officer Struble asked Rodriguez for permission to walk his dog around Rodriguez's vehicle. Rodriguez refused that permission. Officer Struble then directed Rodriguez to turn off the ignition, get out of his vehicle, and stand in front of the cruiser until the second officer arrived. That officer, Deputy Decals, arrived at 12:33 a.m., or approximately 6-7 minutes after the traffic stop had concluded. About one minute later, Struble walked his dog around the vehicle. The dog alerted on the vehicle, and a search revealed a large bag of methamphetamine.

2. District Court proceedings

The United States charged Rodriguez with possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1). Rodriguez filed a motion to suppress the drug evidence, arguing that the dog sniff occurred during an unlawful detention that was not supported by reasonable suspicion of criminal activity. After hearing evidence, the Magistrate Judge denied the motion. Although Magistrate Judge acknowledged that the sniff came up to eight minutes *after* the traffic stop had concluded, he believed the Eighth Circuit would consider such a

delay a "de minimis intrusion on the defendant's Fourth Amendment rights." (Tr. 80: 12-14) While the Magistrate Judge personally disagreed with that position, he believed that Eighth Circuit precedent such as United States v. Morgan, 270 F.3d 625 (8th Cir. 2001), United States v. 404,905.00 in Currency, 182 F.3d 643 (1999), and United States v. Martin, 411 F.3d 998 (8th Cir. 2005), allowed for up to ten minutes of suspicionless detention following a traffic stop for officers to conduct a dog sniff. (Tr. 80: 22-23)

The district court adopted the Magistrate Judge's findings and its legal conclusion that the post-stop detention and dog sniff did not violate the Fourth Amendment. The district court stated, "The magistrate judge concluded that the initial stop of 19 minutes, plus the 7 to 10 minutes for the dog to alert thereafter, was not of constitutional significance. The court agrees with the findings of fact and conclusions of law in this regard." (Memorandum & Order p. 4, App. ___) It then denied Rodriguez's motion to suppress the evidence discovered after the dog sniff of Rodriguez's vehicle. Rodriguez subsequently entered a conditional guilty plea to the indictment, reserving his right to appeal the denial of his motion to suppress.

3. The Decision of the Court of Appeals

The lower courts' prediction of what the Eighth Circuit would find acceptable proved to be correct. Rodriguez appealed the denial of his motion to suppress, but the Eighth Circuit affirmed. Citing this Court's decision in Illinois v Caballes, 543 405, 408 (2005), the Eighth Circuit started with the proposition that "a dog sniff may be the product of an unconstitutional seizure, 'if the traffic stop is unreasonably prolonged before the dog is employed.'" Martin, 411 F.3d at 1002 (citing Caballes, 543 U.S. at 407). The Eighth Circuit then continued:

> A brief delay to employ a dog does not unreasonably prolong the stop, however, and we have repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded. See, e.g., United States v. Alexander, 448 F.3d 1014, 1017 (8th Cir. 2006) (four-minute delay upheld as a *de minimis* intrusion on personal liberty); Martin, 411 F.3d at 1002 (two-minute delay upheld); United States v. Morgan, 270 F.3d 625, 632 (8th Cir. 2001) (delay of "well under ten minutes" upheld); 404,905.00 In U.S. Currency, 182 F.3d at 649 (two-minute delay upheld).
>
> Although the dog was located in the patrol car, Struble waited to employ it until a second officer arrived, explaining that he did so for his safety because there were two persons in Rodriguez's vehicle. The resulting seven-or-eight-minute delay is similar to the delay that we have found to be reasonable in other circumstances. See Morgan, 270 F.3d at 632 ("We do not believe that the few minutes difference between the time in this case and $404,905 has constituitonal significance.") We thus conclude that it constituted a *de minimis* intrusion on Rodriguez's personal liberty.

United States v. Rodriguez, 741 F.3d 905, 907-08 (8th Cir. 2014). Having decided that the traffic stop was not unreasonably prolonged, the court did not even address whether the circumstances of the stop gave rise to reasonable suspicion to detain Rodriguez in any event.

Rodriguez believes that the Eighth Circuit's has misinterpreted the meaning of a "prolonged" stop in Illinois v. Caballes, and that the Fourth Amendment prohibits even a "de minimis" post-stop detention without reasonable suspicion or probable cause. He seeks a writ of certiorari from the Eighth Circuit's decision.

Reasons for Granting the Writ

State and federal courts of appeals are divided over whether the Fourth Amendment permits a "de minimis" extension of an otherwise-concluded traffic stop in order to facilitate a canine sniff. Both sides of this conflict start with this Court's decisions on what is permissible within the confines of lawful traffic stop. However, they

diverge when they examine what should happen after the officer has issued a traffic ticket and ended the stop. Some courts consider any detention after this time a separate seizure requiring separate justification. Others, like the Eighth Circuit, find an officer's act of ending the stop merely incidental, and permit extensions of up to ten minutes with no additional suspicion.

This Court should use this case to resolve this conflict and clear up the lingering confusion over the constitutional limits of routine traffic stops. These stops play a central role in many criminal prosecutions and, more importantly, in the day-to-day lives of the traveling public. If not properly contained, permitting "de minimis" intrusions on personal liberties could swallow the protections of the Fourth Amendment entirely. To prevent such a result, this Court should grant certiorari.

I. **Federal and state courts are divided over whether the Fourth Amendment permits a "de minimis" extension of an otherwise-concluded traffic stop in order to facilitate a canine sniff.**

The Court of Appeals' decision in Rodriguez is consistent with a long line of Eighth Circuit precedent stretching back to United States v. $404,905.00 in Currency, supra, 182 F.3d at 643. There, the Eighth Circuit confronted what it considered to be "a novel issue concerning the Fourth Amendment interplay between traffic stops and canine sniffs." Id. at 645. Specifically, the Eighth Circuit addressed whether officers violated a motorist's Fourth Amendment rights when, after completing its investigation of a routine traffic violation, the investigating officer took less than two minutes to conduct a canine sniff around the exterior of the motorist's vehicle. Id. at 646. The traffic stop was unquestionably complete by the time the dog sniff occurred, and the

sniff was done "without reasonable suspicion to believe there were drugs in this particular vehicle." Id. at 649. Nonetheless, the court held that the officer's actions had not violated the motorist's constitutional rights, stating:

> [W]hen a police office makes a traffic stop and has at his immediate disposal the canine resources to employ this uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior.

Id. at 648.

The court gave three reasons for its decision in $404,905 in U.S. Currency. First, while length of detention is an important factor in the analysis of Terry investigative stops, where officers must "diligently pursue" a given means of investigation, that limitation does not similarly apply to traffic stops. Id. at 648. "Given the myriad situations in which traffic stops occur," the Eighth Circuit said, "it is not reasonable to subject them to the length-of-detention analysis we use in evaluating investigatory stops." Id. Second, the court asserted, "the line [marking completion of a traffic stop] is quite artificial." Id. "When the constitutional standard is reasonableness measured by the totality of the circumstances, we should not be governed by artificial distinctions." Id. Finally, "[the officer's] conduct on the whole was not constitutionally unreasonable." Id. According to the Eighth Circuit, a two-minute extension of a traffic stop is a "de minimis" intrusion on a person's liberty. Id.

The Eighth Circuit's decision in $404,905.00 in U.S. Currency preceded this Court's most analogous case on dog sniffs and traffic stops, Illinois v. Caballes, supra, 543 U.S. at 405. In Caballes, the narrow question was whether, *in the midst* of a traffic stop, an officer could use a drug-detection dog to sniff a vehicle without possessing

reasonable suspicion of criminal activity. Id. at 407. The Court held that such a dog sniff would not violate the Fourth Amendment provided that the stop was "lawful at its inception and otherwise executed in a reasonable manner." Id. at 408. The Court noted, however, that the answer would be different if the dog sniff occurred "during an unreasonably prolonged traffic stop" or the driver was otherwise being "unlawfully detained." Id. at 408.

After the decision in Caballes, defendants asked the Eighth Circuit to reconsider its position on the legality of dog sniffs after a traffic stop had concluded. See, e.g., United States v. Alexander, 448 F.3d 1014, 1017 (8th Cir. 2006); United States v. Norwood, 377 F.3d 580 (8th Cir. 2010). These defendants argued that a dog sniff that occurred after an otherwise-concluded traffic stop would fall outside of the parameters approved in Caballes. However, the Eighth Circuit has stood firm on its "de minimis" rule. The court stated:

> [W]e see no inconsistency between Caballes and [our prior cases]. Because the parties agreed in Caballes that the dog sniff occurred during a legitimate traffic stop, the Court was not called upon to address the question of the length of time that a dog sniff can constitutionally be conducted following the conclusion of a legitimate stop. 543 U.S. at 407, 125 S.Ct. 834. Moreover, the Court noted that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise conducted in a reasonable manner." Id. at 408, 125 S.Ct. 834. It is precisely this reasonableness inquiry that led us to recognize in $404,905.00 that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior. 182 F.3d at 649.

Alexander, 448 F.3d at 1017.

Other jurisdictions have joined the Eighth Circuit in holding that a brief extension of a traffic stop for a dog sniff is not constitutionally unreasonable. See, e.g., United

States v. Williams, Nos. 1:12-cr-00264-1 & 1:12-cr-00264-2, 2013 WL 1435199 (M.D. N.C. April 9, 2013) (relying on multiple Eighth Circuit cases, including $404,905.00 in U.S. Currency, in approving post-stop canine sniff); United States v. Sellars, 630 S.E.2d 208 (Ct. App. N.C. 2012) (dog sniff which extended stop after issuance of warning ticket is "de minimis" extension that requires no additional justification); Hugueley v. Dresden Police Dep't, 469 F.Supp.2d 507, 512 (W.D. Tenn. 2007) (citing Eighth Circuit precedent in holding that a brief detention for a dog sniff beyond the completion of a traffic stop does not violate the Fourth Amendment); State v. Box, 73 P.3d 623, 629 (Ariz. Ct. App. 2003) (adopting "de minimis" exception for suspicionless dog sniffs conducted immediately after a legitimate traffic stop); State v. De La Rosa, 657 N.W.2d 683, 689 (S.D. 2003) (allowing extension of "short duration" for dog sniff after conclusion of a traffic stop). These courts have concluded, like the Eighth Circuit, that separating an officer's actions into distinct sequences is an artificial enterprise, and that brief extensions are permissible when measured by the standard of overall "constitutional reasonableness." DeLaRosa, 657 N.W.2d at 688 (citing $404,905 in U.S. Currency).

A number of other jurisdictions disagree, however. In fact, had this case been litigated in a Nebraska state court rather than a Nebraska federal court, the outcome would have been different. In State v. Louthan, 744 N.W.2d 454 (Neb. 2008), the Nebraska Supreme Court considered an appeal from a motorist who had been stopped for a traffic violation and then held briefly after the completion of the traffic stop so that an officer could take his drug detection dog around the vehicle. Id. at 459. Only 4 minutes elapsed from the time that the officer concluded the traffic investigation and the

time that the dog alerted. Id. at 459-60.

In Louthan, there was no question that the initial stop for expired license plates was valid. Therefore, the only issue on appeal was "whether Louthan's Fourth Amendment rights were violated when a law enforcement officer prolonged [the] traffic stop for several minutes in order to deploy a drug dog." Id. at 101, 744 N.W.2d at 458. The Nebraska Supreme Court held that they were. The court specifically distinguished Louthan's case from Caballes, where the dog sniff occurred in the middle of the investigation into the initial traffic violation. The drug detection dog in Louthan's case "was not deployed until *after* the investigative steps incident to the traffic stop had been completed." Id. at 460. (emphasis added). The state downplayed the distinction, and urged the court to adopt the "de minimis" standard employed in $404,905 in U.S. Currency. Id. at 461. However, unlike the Eighth Circuit, the Nebraska Supreme Court declined. The court stated:

> We are not persuaded to abandon the reasonable suspicion standard in favor of the "de minimis rule" advocated by the State. In Caballes, the Court specifically noted a distinction between a dog sniff occurring during a routine traffic stop and one occurring during an "unreasonably prolonged traffic stop."
>
> . . . While the detention for the dog sniff was not lengthy, that is but one factor in the Fourth Amendment analysis, which requires the dual inquiries of "whether the officer's action was justified at its inception, and whether it was reasonably related in scope in the circumstances which justified the interference in the first place." . . We agree that "the *threshold* question . . . is whether the officer had an appropriate basis upon which to detain the citizen" after concluding the routine traffic stop. We conclude that the "reasonable suspicion" test if the appropriate, necessary, and correct standard for resolving that question.

Id. at 462 (internal citations omitted).

Several other state and federal courts have rejected the "de minimis " exception

for dogs sniffs and adopted the Nebraska Supreme Court's position. See, e.g., United States v. Stepp, 680 F.3d 651, 661-62 (6th Cir. 2012) ("When the initial traffic stop has concluded, we have adopted a bright-line rule that any subsequent prolonging, even de minimis, is an unreasonable extension of an otherwise lawful stop") United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997) (invalidating dog sniff that occurred after lawful traffic stop concluded); State v. Baker, 229 P.3d 650 (Utah 2010) (dog sniff is legal only when it is performed during the course of a lawful stop, not after lawful purposes of stop have concluded); D.K. v. State, 736 N.E.2d 758 (Ind. App. 2000) (invalidating suspicionless dog sniff that occurred minutes after conclusion of traffic stop). To these courts, it makes no difference that the detention may be brief. They subscribe to the Sixth Circuit's position that, under the Fourth Amendment, "even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity." United States v. Urrieta, 520 F.3d 569, 572 (6th Cir. 2008).

As this survey of cases demonstrates, the conflict among the courts on the question of "de minimis" extensions of traffic stops is deep and intractable. Because of the importance of the constitutional issue involved, and because canine sniffs occur in countless stops across the country on a daily basis, uniformity among the courts is necessary. See Fuller v. Oregon, 417 U.S. 40, 42 (1974) (noting importance of resolving conflicts over constitutional questions). This Court should therefore grant certiorari.

II. The Eighth Circuit's "de minimis" exception to the Fourth Amendment stands in conflict with this Court's precedent.

Contrary to the Eighth Circuit's position, this Court's precedent does not permit

the suspicionless, "de minimis" extensions of traffic stops that the Eighth Circuit has endorsed. This Court has always guarded against prolonging traffic stops absent particularized suspicion of criminal activity. And while the Court has allowed law allowed "de minimis" deviations from the business of the traffic investigation *during* a lawful stop, it has never allowed those deviations to override the parameters of the stop itself.

The idea of a traffic stop as a brief, well-contained detention is central to several of this Court's decisions. This concept motivated the decision in Berkemer v. McCarty, 468 U.S. 420 (1984), for example, when the Court held that Miranda warnings need not be given prior to questioning during a routine traffic stop. According to the Court, traffic stops are distinguishable from full custodial arrests in important aspects. Most importantly, unlike arrests, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief." Id. at 438. Motorists should typically be detained only as long as is required for the officer to check his license and registration and issue a citation or warning. Id.

The Court reinforced this concept in Knowles v. Iowa, 525 U.S. 113 (2000). There, the Court held that the issuance of a citation for a traffic stop does not permit a full search of the vehicle stopped. Again, the Court described a traffic stop as a relatively brief encounter analogous to a Terry stop. Id. at 117. Thus, like a Terry stop, any investigation during a traffic stop must be limited in both duration and scope. Id.

Consistent with the principle of a traffic stop as a limited detention, the Court has warned that any investigation that prolongs a traffic stop beyond its natural conclusion must be supported by individualized suspicion. This warning accompanied the Court's

decision in Illinois v. Caballes. While the Court in Caballes held that a dog sniff *during* a reasonably-executed stop will not violate the Fourth Amendment, it was quick to point out that reasonable suspicion would be required for any sniff occurring "during an *unreasonably prolonged* traffic stop." Id. at 407-08 (emphasis added). Similarly, in Muehler v. Mena, the Court held that questions that do not go directly to the purpose of the initial traffic violation are permissible only as long as they do not prolong the stop. 544 U.S. at 101. If the questioning prolongs a stop, it must be supported by particularized suspicion. Id. at 101 & n. 3.

The Eighth Circuit is concerned that identifying when a traffic stop is "prolonged" is an exercise in artificial line-drawing. Alexander, 448 F.3d at 1017. This Court, however, has had no problem defining when a traffic stop ends. According to this Court, a traffic stop normally ends "when the police have no further need to control the scene." Arizona v. Johnson, 555 U.S. 323, 333 (2009). That moment is most often communicated to the driver and any passengers through the issuance of a traffic or warning ticket and the return of any and all documents. See, e.g., United States v. Villa, 589 F.3d 1334, 1339 (10th Cir. 2009) ("Once an officer returns the driver's license and registration, the traffic stop has ended and questioning must cease; at that point, the driver must be free to leave"); United States v. Singh, 363 F.3d 347, 356 (4th Cir.2004) (after an officer issues a warning or citation and returns a driver's license and registration, the driver may "proceed on his way, without being subject to further delay by police for additional questioning"); United States v. Santiago, 310 F.3d 336, 342 (5th Cir. 2002) ("Once a computer check is completed and the officer either issues a citation or determines that no citation should be issued, the detention should end and the driver

should be free to leave"). Any action that takes place after that moment both logically and necessarily "prolongs" the encounter. In a prolonged encounter, the "de minimis" intrusions that are permissible within the parameters of a traffic stop are no longer acceptable. Caballes, 543 U.S. at 407-08. The Fourth Amendment applies to the encounter and requires, at a minimum, "articulable and reasonable suspicion" to support an investigative traffic stop. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

Separating the two encounters in the way the Court has separated them is not only constitutionally required, it makes sense from a policy standpoint. When a stop is ongoing, the Court is understandably wary of "micromanag[ing] an officer's control of the stop." Sellars, supra, 296 P.3d at n. 4. Concerns of officer safety pervade and, since the driver is already lawfully detained, his or her personal liberty is already compromised. Mimms, 434 U.S. at 111.; see also Maryland v. Wilson, 519 U.S. at 408, 413 (1997). In this context, "de minimis" intrusions do not change the character of the stop and can therefore be tolerated. Id.

The same cannot be said, however, of a post-stop encounter. Although officer safety remains important, the officer has lessened his or her control over the encounter by concluding the business of the traffic stop and returning the occupants' documents. Johnson, 555 U.S. at 332. And, unless the officer can identify reasonable suspicion of criminal activity, the driver should be free to leave. In these circumstances, officers are initiating a new seizure when they seek to conduct a canine sniff. Liberty is compromised not because of the traffic violation that permitted the stop in the first instance but because of the officer's own curiosity or hunch. When that is the case, the length of detention is irrelevant. "The Fourth Amendment applies to all seizures of the

person, including seizures that involve only a brief detention short of traditional arrest." Davis v. Mississippi, 394 U.S. 721 (1969); see also Terry v. Ohio, 392 U.S. at 1 (1968). With a new seizure comes the requirement of new justification.

In summary, there is a fundamental distinction between what acts law enforcement can take once an individual is lawfully seized what is required to *seize* an individual in the first place. Mena, 544 U.S. at n. 3. Under this Court's cases, the question of whether an intrusion was "de minimis" is relevant only when an officer is still in the midst of a lawful traffic stop. Otherwise, the brevity of any additional intrusion is irrelevant. The Eighth Circuit's caselaw is not compatible with this precedent. To reconcile this conflict, this Court should grant certiorari.

III. The question of whether the Fourth Amendment tolerates "de minimis" violations is a question of exceptional importance.

The issue presented in this petition is important to both law enforcement officers and to the citizens they detain. Though the Eighth Circuit laments rules based on "artificial" lines, the "de minimis" exception itself introduces an ambiguity that is detrimental to effective law enforcement. In the Eighth Circuit alone, the amount of time considered a "de minimis" extension appears to be anywhere from the 2 minutes permitted in $404,905 in U.S. Currency to up to ten minutes. United States v. Morgan, 270 F.3d 625, 631-32 (8th Cir. 2001).The ambiguity inherent in the "de minimis" exception makes it difficult for law enforcement officers to know with certainty that they are operating within constitutional bounds. See Berghuis v. Thompkins, 130 S.Ct. 2250, 2260 (2010) (ambiguous standards hinder law enforcement officers' ability to make decisions in the field).

The issue presented in Rodriguez's case is also significant because of its potential ramifications in other areas of Fourth Amendment jurisprudence. While the "de minimis" exception was originally announced in a traffic stop case, the manner in which the Eighth Circuit has defined it makes it applicable to other contexts as well. If a "de minimis" intrusion is simply measured by length of time and not, as in Mimms and Caballes, by the within-stop context in which it occurs, virtually any brief encounter can fall outside of the Fourth Amendment's protections. To stem any further erosion of the Fourth Amendment's safeguards, this Court should grant certiorari.

Conclusion

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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OPPOSITION BRIEF

No. 13-9972

IN THE SUPREME COURT OF THE UNITED STATES

DENNYS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the police may initiate a dog sniff following a de minimis delay motivated by officer-safety concerns, where the stopped motorist has declined consent, but the police have a reasonable suspicion that the stopped motorist is engaging in illegal conduct.

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-9972

DENNYS RODRIGUEZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-3A) is reported at 741 F.3d 905. The opinion of the district court (Pet. App. 4A-8A) is not published in the Federal Reporter but is available at 2012 WL 5458427.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed. Pet. App. 1A-3A; Gov't C.A. Br. 1-2.

1. On March 27, 2012, just after midnight, Morgan Struble, a canine officer with the Valley Police Department in Nebraska, was in his patrol car with his drug dog when he observed the vehicle petitioner was driving veer slowly onto the shoulder of the highway and then jerk back onto the road. Pet. App. 2A; 7/10/12 Hrg. Tr. (Tr.) 3-6, 29. Officer Struble initiated a traffic stop of the vehicle at 12:06 a.m. Passenger Scott Pollman was seated in the front seat beside petitioner. See Pet. App. 2A.

As Officer Struble approached the vehicle, he noticed an "overwhelming" odor of air freshener. Tr. 6-7, 32-33; see Pet. App. 5A. According to Struble, the use of "overwhelming" air freshener is a "common tactic" for covering up the scent of contraband such as illegal drugs. Tr. 35-36. Struble also observed that Pollman had his hat pulled down over his eyes, was

looking straight ahead, and would not make eye contact, as if he did not want to be seen. Pet. App. 2A; Tr. 7, 32. Struble explained at the suppression hearing that Pollman appeared unusually nervous for a mere passenger in a stopped vehicle. Pet. App. 2A, 5A; Tr. 7, 18-19.

After Officer Struble collected petitioner's license, registration, and proof of insurance, he asked petitioner to sit in the patrol vehicle while a records check was completed. Petitioner asked if he was required to do so, and Struble responded that he was not. Petitioner thus declined to accompany Struble and instead waited in his own vehicle. Pet. App. 2A. Struble testified that, in his time as a police officer, he had never encountered anyone else who was "so adamant against" sitting in the patrol vehicle. Tr. 34. Struble believed that petitioner's behavior indicated that he did not want to be far from his vehicle or its contents. At the suppression hearing, Struble explained that, in his experience, "people concealing contraband" tend not to "want to distance themselves too much from their contraband." Tr. 35.

Struble ran a records check on petitioner and returned to the vehicle. He asked Pollman for identification and inquired into where the two men were coming from. Pollman stated that they had traveled to Omaha, Nebraska, to look at a car that was for sale and that they were returning to Norfolk, Nebraska.

Pet. App. 2A; Tr. 10. Pollman stated that he had not seen any pictures of the vehicle before making the trip. Officer Struble found it "suspicious" and "abnormal" that the men would drive four hours to Omaha and back "that late at night to see a vehicle sight unseen to possibly buy it." Tr. 11, 41, 45. Pollman also stated that he had not bought the vehicle because the seller did not have the title to it. Struble found it similarly unlikely that the two men would have driven that distance to look at a car without obtaining any title information in advance. Ibid.

Struble returned to his patrol car to run a records check on Pollman. At that point, he also called for a second officer because he was concerned about his safety. Struble issued a written warning to petitioner at 12:27 or 12:28 a.m. Pet. App. 2A; Tr. 47-48, 51. Struble then asked permission to walk his dog around petitioner's vehicle. When petitioner refused consent, Struble directed petitioner to step out of the vehicle. Petitioner rolled up the windows of his car and then stood in front of the patrol car with Struble while Struble waited for the second officer. Pet. App. 2A-3A; Tr. 14-15. After the second officer arrived, Struble led his drug dog around petitioner's car, and, within 20 to 30 seconds, the dog alerted to the presence of drugs. "All told, seven or eight minutes had passed from the time Struble had issued the written warning

until the dog indicated the presence of drugs." Pet. App. 3A; see also id. at 7A. A search of the vehicle uncovered a large bag of methamphetamine. Id. at 3A.

2. Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Petitioner moved to suppress the drugs seized from his car, arguing that the dog sniff occurred during an unlawful detention that was not supported by reasonable suspicion of criminal activity. After an evidentiary hearing, a magistrate judge issued oral findings and a recommendation to deny the motion to suppress. Pet. App. 9A-19A. At the outset, the magistrate judge found Officer Struble, the only witness who testified at the suppression hearing, to be credible. Id. at 9A. The magistrate judge declined to find that reasonable suspicion had supported the detention after Struble issued the written warning, id. at 18A, but, citing Eighth Circuit precedent, concluded that the extension of the stop by "seven to eight minutes" for the dog sniff was only a de minimis intrusion on petitioner's Fourth Amendment rights. Id. at 14A-16A.

The district court agreed with the magistrate judge. Pet. App. 6A-7A. Emphasizing that Officer Struble "requested backup for officer safety," that the backup officer "responded in a

short period of time," and that the drug dog was already in Struble's car and was deployed "immediately" after the backup officer arrived, the district court concluded that conducting the dog sniff after Struble had already issued a written warning was a constitutional, de minimis intrusion into petitioner's privacy rights. Id. at 7A. The district court did not address whether reasonable suspicion supported extending petitioner's detention, beyond generally stating that it was adopting the magistrate judge's findings. Id. at 8A.

In light of the denial of the motion to suppress, petitioner entered a conditional guilty plea, reserving his right to appeal the court's Fourth Amendment ruling. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. Gov't C.A. Br. 1-2.

3. The court of appeals affirmed the denial of the motion to suppress. Pet. App. 1A-3A. In accordance with Illinois v. Caballes, 543 U.S. 405 (2005), the court pointed out that "[a] dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in privacy." Pet. App. 3A (quoting United States v. Martin, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting Caballes, 543 U.S. at 408)). The court rejected petitioner's argument that the stop was "unreasonably prolonged" by the "brief delay" in deploying

the dog. Ibid. Like the district court, the court of appeals highlighted the fact that the dog sniff had been delayed only because Struble was waiting for a second officer to arrive out of concern "for his safety because there were two persons in [petitioner's] vehicle." Ibid. Noting that it had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded," the court concluded that the "seven- or eight-minute delay" in this case was -- like the brief delays in those cases -- only a "de minimis intrusion on [petitioner's] personal liberty." Ibid.; see also ibid. (citing United States v. Alexander, 448 F.3d 1014, 1017 (8th Cir. 2006), cert. denied, 549 U.S. 1118 (2007); United States v. Morgan, 270 F.3d 625, 632 (8th Cir. 2001), cert. denied, 537 U.S. 849 (2002); United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1999), cert. denied, 528 U.S. 1161 (2000)). The court thus held that no Fourth Amendment violation had occurred. Id. at 1A-3A.

The court of appeals did not address the government's argument that the police had a reasonable suspicion that petitioner was engaged in criminal activity, independently justifying further detention. Pet. App. 1A-3A.

ARGUMENT

Petitioner argues (Pet. 7-18) that, although the dog sniff in this case may have been permissible if it had been conducted

during the concededly lawful traffic stop, it violated the Fourth Amendment because it was delayed seven to eight minutes while the canine officer awaited the arrival of a backup officer for safety. The court of appeals correctly rejected that argument, and, contrary to petitioner's contention (Pet. 8-13), its decision does not conflict with any decision of this Court or of any other court of appeals or state court of last resort. This Court has recently denied review in cases raising the same claim and arising from the same court of appeals. See, e.g., Norwood v. United States, 131 S. Ct. 996 (2011) (No. 10-6178); Alexander v. United States, 549 U.S. 1118 (2007) (No. 06-5881). The same outcome is warranted here.

1. a. In Illinois v. Caballes, 543 U.S. 405, 407 (2005), this Court addressed the question "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." In that case, one officer walked his dog around the defendant's car while another officer "was in the process of writing a warning ticket." Id. at 406. In concluding that the dog sniff was permissible without any level of suspicion, the Court explained that the use of a well-trained narcotics-detection dog -- one that "does not expose noncontraband items that otherwise would remain hidden from public view" -- during a lawful traffic stop generally does not

implicate legitimate privacy interests. Id. at 409. In this case, the dog sniff was performed on the exterior of petitioner's car after he had been lawfully seized for a traffic violation. The sniff itself did not intrude on petitioner's legitimate privacy expectations. See ibid. (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

Petitioner does not dispute that his vehicle "was lawfully seized for a traffic violation." Caballes, 543 U.S. at 409. Nor does he dispute that the drug-detection dog used by the officers was "well-trained" enough that the "sniff * * * performed on the exterior of [petitioner's] car" did "not expose noncontraband items that otherwise would remain hidden from public view." Ibid. Rather, petitioner's sole ground for distinction from Caballes is that the sniff in Caballes occurred "while [an officer] was in the process of writing a warning ticket," id. at 406, whereas the sniff here occurred several minutes after Officer Struble had finished writing a ticket, once a backup officer had arrived to help ensure Struble's safety. He contends that Struble's deploying the dog shortly after writing the warning ticket and immediately after satisfying his safety concerns -- thereby extending the 21-minute stop by seven to eight minutes -- amounted to a significantly greater "intrusion on * * * privacy

expectations," id. at 409, than the intrusion at issue in Caballes.

The court of appeals correctly concluded that the "de minimis" seven- to eight-minute delay of petitioner's departure to safeguard Office Struble did not itself render unreasonable the otherwise-permissible dog sniff. Pet. App. 3A; see also Pet. 10-11 (explaining that "[o]ther jurisdictions have joined the Eighth Circuit in holding that a brief extension of a traffic stop for a dog sniff is not constitutionally unreasonable" and citing cases). That conclusion is consistent with common sense -- the fact that the sniff was conducted shortly after, instead of during, the issuance of the warning did not change what the sniff itself would or would not reveal, nor did it subject petitioner's vehicle or personal effects to any greater intrusion. Struble had the drug dog on site with him and delayed the sniff for several minutes solely because he was concerned about the threat that two men on a deserted rural highway in the middle of the night might pose to his safety. Gov't C.A. Br. 4. If two officers had conducted the stop rather than one, the dog sniff would have occurred several minutes earlier, but the additional time was de minimis. And had the dog not alerted, petitioner would have been free to go, with no exposure of his personal effects and only a brief, de minimis interference with his travel plans. The "intrusion on * * *

privacy expectations" in this case accordingly had no greater constitutional significance than the minimal intrusion in Caballes. 543 U.S. at 409.

This Court has recently denied review in similar cases, including one on which the district court (Pet. App. 7A) and the court of appeals (Pet. App. 3A) relied. See United States v Alexander, 448 F.3d 1014, 1016-1017 (8th Cir. 2006) (upholding a suspicionless dog sniff completed four minutes after the officer told defendant he would be receiving a warning ticket for a traffic violation), cert. denied, 549 U.S. 1118 (2007); see also United States v. Norwood, 377 Fed. Appx. 580, 582-583 (8th Cir. 2010) (finding no Fourth Amendment violation when dog sniff was completed one minute and a half after the officer issued a verbal warning and the defendant's voluntary participation in further questioning had ceased), cert. denied, 131 S. Ct. 996 (2011). There is no reason for a different result here.

b. The dog sniff in this case was independently justified by Officer Struble's reasonable suspicion -- unrelated to petitioner's traffic offense -- that unlawful activity was taking place. The scope of a valid investigatory detention may be expanded if an officer can identify "specific and articulable facts" that make him suspicious that "criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 21-22, 30 (1968); see, e.g., United States v. Chavez Loya, 528 F.3d 546, 553 (8th Cir. 2008)

("An officer may expand the scope of a traffic stop beyond the initial reason for the stop and prolong the detention if the driver's responses and the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot."). In petitioner's case, Officer Struble had ample reasonable suspicion to initiate the dog sniff after the conclusion of the traffic stop. Although the court of appeals did not rule on those grounds, a prevailing party is "of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); see Gov't C.A. Br. 15-19.[1]

Officer Struble reasonably suspected that petitioner's car contained illicit drugs. That reasonable suspicion was based on numerous factors including the overwhelming odor of air freshener emanating from petitioner's car, passenger Pollman's nervous behavior and attempts to avoid being looked at closely, and Officer Struble's belief that Pollman's story about the reason for making the long trip to Omaha in the middle of the

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[1] Although the magistrate judge made an oral finding that reasonable suspicion did not justify extending the detention after the written warning was issued, the magistrate judge did not engage in an extended analysis, see Pet. App. 18A, and neither the district court nor the court of appeals addressed the issue.

night was not credible. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion."); United States v. Branch, 537 F.3d 328, 338 (4th Cir. 2008) (explaining that nervousness of driver, passenger's refusal to make eye contact, and "presence of several air fresheners" in car contributed to reasonable suspicion of illicit drug activity), cert. denied, 555 U.S. 1118 (2009); United States v. Fuse, 391 F.3d 924, 929-930 (8th Cir. 2004) (holding that "a strong odor of air freshener" helped "demonstrate reasonable suspicion justifying continued detention of [defendant] to conduct a dog sniff"), cert. denied, 544 U.S. 990 (2005); see also United States v. Riley, 684 F.3d 758, 764 (8th Cir.) ("[R]easonable suspicion could derive from 'unusual or suspicious travel plans.'" (quoting United States v. Beck, 140 F.3d 1129, 1139 (8th Cir. 1998))), cert. denied, 133 S. Ct. 800 (2012). Moreover, immediately after petitioner declined to consent to a dog sniff of his car and Officer Struble asked him to step out of his vehicle to await the arrival of the backup officer, petitioner rolled up the windows of his car, further contributing to Struble's reasonable suspicion that the air fresheners were being used to mask the scent of odors detectable to a drug dog.

Officer Struble took reasonable, minimally intrusive steps to investigate his reasonable suspicion of illicit activity. As soon as the backup officer he had called for protection arrived, Struble deployed the drug dog that had been on the scene with him since the beginning of the stop, and the dog alerted to the presence of drugs within 20 to 30 seconds. Because the dog sniff was based on Struble's reasonable suspicion that additional criminal activity was afoot and was "reasonably related in scope to the circumstances which justified [it]," Terry, 392 U.S. at 20, it was lawful regardless of whether Struble could otherwise have detained petitioner for an additional seven to eight minutes after issuing the written warning. Resolution of the issue on which petitioner seeks further review would therefore have no effect on the outcome of his case.

2. Petitioner is incorrect (Pet. 11-13) that further review is warranted based on an asserted conflict between the outcome in this case and a decision of this Court, another federal court of appeals, or any state court of last resort.

a. Petitioner's contention (Pet. 14-15) that the court of appeals' decision conflicts with Caballes is incorrect. Petitioner argues that, "[w]hile the Court in Caballes held that a dog sniff during a reasonably-executed stop will not violate the Fourth Amendment, it was quick to point out that reasonable

suspicion would be required for any sniff occurring 'during an unreasonably prolonged traffic stop.'" Pet. 15 (emphases omitted) (quoting Caballes, 543 U.S. at 407). But petitioner's traffic stop was not "unreasonably prolonged." The Court in Caballes cited People v. Cox, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003), as an example of a case in which a traffic stop was unreasonably prolonged. 543 U.S. at 407-408. The officer who initiated the traffic stop at issue in Cox called in a canine unit that did not arrive at the scene until "approximately 15 minutes after the initial traffic stop." 782 N.E.2d at 277, 280. In the instant case, by contrast, Officer Struble had a drug-detection dog in his patrol car from the outset and extended the stop by at most eight minutes, primarily to await the arrival of a backup officer who could help ensure his safety. Also, whereas the court in Cox expressed its view that the officer who had initiated the traffic stop had unreasonably extended the duration of the stop to allow the dog to arrive on the scene before the stop had concluded, id. at 280, petitioner makes no such allegation. Moreover, the court in Cox determined that the officer in that case did not have a reasonable, articulable suspicion that the defendant was engaged in illegal activity. Id. at 280-281. The court of appeals did not reach that issue in this case. As discussed previously, see pp. 11-14, supra, Officer Struble was justified in extending his

stop of petitioner in order to conduct the dog sniff, based on his reasonable suspicion that petitioner was engaged in illegal activity. Because the stop of petitioner was not "unreasonably prolonged" by waiting to conduct or by conducting the dog sniff, the court of appeals' decision is fully consistent with Caballes.[2]

b. Nor is there merit to petitioner's argument (Pet. 11-12) that the outcome of his case would have been different if his case had been litigated in a Nebraska state court rather than a Nebraska federal court. Petitioner relies on State v. Louthan, 744 N.W.2d 454 (Neb. 2008), in which the Nebraska Supreme Court interpreted this Court's decision in Caballes as "indicat[ing] that there is a constitutionally significant line of demarcation between a routine traffic stop and one in which a dog sniff is conducted after the investigative procedures incident to the traffic stop have been completed." Id. at 462 (emphasis

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[2] The other case on which petitioner primarily relies (Pet. 15), Muehler v. Mena, 544 U.S. 93 (2005), also does not support his point that "any investigation that prolongs a traffic stop beyond its natural conclusion must be supported by individualized suspicion." Pet. App. 14. In Muehler, the Court merely held that officers did not violate the defendant's Fourth Amendment rights by questioning her about her immigration status while she was validly detained on other grounds because the questioning did not prolong her detention. 544 U.S. at 101. The case did not address whether a de minimis extension of a traffic stop, as here, must be supported by reasonable suspicion.

omitted). It is true that the Louthan court declined (as petitioner notes, Pet. 12) to adopt the Eighth Circuit's "de minimis rule" (which was applied in this case), instead concluding that law enforcement officers may not initiate a dog sniff after the conclusion of a lawful traffic stop unless they have a reasonable suspicion. 744 N.W.2d at 461-462. Where such a suspicion exists, the state court stated that a court must determine whether the extended detention was reasonable. Id. at 462.

But any divergence in approach between the Nebraska Supreme Court and the Eighth Circuit does not merit further review of petitioner's case because petitioner would not have prevailed under the standard articulated in Louthan either. Officer Struble's reasonable, articulable suspicion that petitioner was engaged in illegal activity independently justified the additional seven- to eight-minute detention of petitioner for the purpose of conducting the dog sniff. The court in Louthan upheld a delay of seven minutes based on a similarly reasonable suspicion that illegal activity was afoot. 744 N.W.2d at 464. Thus, petitioner's suppression argument would not have fared any better in the Nebraska state courts than it did in federal court.

c. For the same reason, further review is not warranted to settle any conflict between the court of appeals' decision and

any of the remaining cases cited by petitioner. See Pet. 12-13 (citing United States v. Stepp, 680 F.3d 651, 661-662 (6th Cir. 2012); United States v. Urrieta, 520 F.3d 569, 578 (6th Cir. 2008); United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997); State v. Baker, 229 P.3d 650 (Utah 2010); D.K. v. State, 736 N.E.2d 758 (Ind. Ct. App. 2000), abrogation recognized by McLain v. State, 963 N.E.2d 662 (Ind. Ct. App. 2012)). Although petitioner is correct that none of those cases applied the "de minimis rule" that the court of appeals applied in this case, each case did conclude that a law enforcement officer may detain an individual beyond the duration of a lawful traffic stop if the officer has a reasonable, articulable suspicion that the individual is engaged in unlawful activity. See Stepp, 680 F.3d at 661; Urrieta, 520 F.3d at 574; Baker, 229 P.3d at 659; D.K., 736 N.E.2d at 762; cf. Wood, 106 F.3d at 948. In this case, as discussed above, the dog sniff of petitioner's car was independently justified under that standard as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2014

JOINT APPENDIX

No. 13-9972

In The
Supreme Court of the United States

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Relevant Docket Entries for the United States District Court for the District of Nebraska (8 Omaha) CRIMINAL DOCKET FOR CASE #: 8:12-cr-00170-JFB-FG3-1

Date Filed	#	Docket Text
05/22/2012	1	INDICTMENT with foreperson's signature redacted pursuant to the E-Government Act as to defendants Dennys Rodriguez, Scott C. Pollman. PART 1 OF 2. (AOA) (Entered: 05/23/2012)
05/30/2012	13	ORDER APPOINTING COUNSEL – The Federal Public Defender for the District of Nebraska is appointed as counsel as to defendant Dennys Rodriguez. Ordered by Magistrate Judge F.A. Gossett. (SLP) (Entered: 05/30/2012)
06/19/2012	23	MOTION to Suppress Evidence and Request for Evidentiary Hearing and Oral Argument by Attorney Shannon P. O'Connor as to defendant(s) Dennys Rodriguez. (O'Connor, Shannon) (Entered: 06/19/2012)
06/19/2012	24	BRIEF in support of MOTION to Suppress Evidence and Request for Evidentiary Hearing and Oral Argument 23 by Attorney Shannon P. O'Connor as to defendant(s)

Dennys Rodriguez. (O'Connor, Shannon) (Entered: 06/19/2012)

06/27/2012 27 RESPONSE regarding MOTION to Suppress Evidence and Request for Evidentiary Hearing and Oral Argument 23 by Attorney Martin J. Conboy, IV as to defendant(s) Dennys Rodriguez. (Conboy, Martin) (Entered: 06/27/2012)

07/10/2012 31 TEXT MINUTE ENTRY for proceedings held on 7/10/2012 before Magistrate Judge F.A. Gossett as to defendant Dennys Rodriguez. Motion Hearing on Motion to Suppress Evidence 23 held. Evidence by the Plaintiff. The court's findings and recommendation was read into the record and no written report will be forthcoming but will be part of the transcript of this hearing. The parties were informed they have 14 days from the filing of the unredacted transcript to file any objections. The court recommends to Judge Bataillon that the Motion to Suppress Evidence 23 be denied. Transcript ordered. Defendant released on bond. Hearing held in Omaha, NE. Appearance for Plaintiff: Martin J. Conboy, IV, USA; Appearance for Defendant: Shannon P. O'Connor, FPD; Courtroom Deputy: Sara Pankoke; Court Reporter: Digital Recorder. No interpreter

		used during hearing. Time Start: 9:45 AM; Time Stop: 12:06 PM; Time in Court: 2 Hours 10 Minutes. (SLP) (Entered: 07/10/2012)
07/10/2012	32	EXHIBIT LIST from hearing held on 7/10/2012 as to defendant Dennys Rodriguez. (SLP) (Entered: 07/10/2012)
07/10/2012	33	WITNESS LIST from hearing held on 7/10/2012 as to defendant Dennys Rodriguez. (SLP) (Entered: 07/10/2012)
07/10/2012	34	FINDINGS AND RECOMMENDATION AND ORDER that the MOTION to Suppress 23 be denied in all respects as to defendant Dennys Rodriguez. It is ordered that the clerk shall cause a transcript of the hearing to be prepared and filed. Pursuant to NECrimR 59.2, any objection to the magistrate's Findings and Recommendation shall be filed with the Clerk of the Court within fourteen (14) days after the unredacted transcript is available to counsel. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection. Ordered by Magistrate

Judge F.A. Gossett. (TEL) (Entered: 07/10/2012)

07/23/2012 37 TRANSCRIPT (UNREDACTED) of motion to suppress proceedings before Magistrate Judge F.A. Gossett held on 7-10-12 as to defendant(s) Dennys Rodriguez. Total Number of Billable Pages: 83. Total Number of Pages: 83. The transcript may be viewed at the court[']s public terminal or purchased through Transcriber Diana Wilkey at (402) 332-4604 or dkwilkey@cox.net before the expiration of the Release of Transcript Restriction deadline. The parties have 5 business days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. *Click here to view the Transcript Redaction Procedure.* Redaction Request due 8/13/2012. Redacted Transcript Deadline set for 8/23/2012. Release of Transcript Restriction set for 10/22/2012. (Wilkey, Diana) Modified on 10/25/2012 to remove restriction language (AOA). (Entered: 07/23/2012)

08/17/2012 40 OBJECTION to Findings and Recommendation,[ ] 34 by Attorney

		Shannon P. O'Connor as to defendant(s) Dennys Rodriguez. (O'Connor, Shannon) (Entered: 08/17/2012)
08/17/2012	41	BRIEF in support of OBJECTION to Findings and Recommendation,[ ] 34 40 by Attorney Shannon P. O'Connor as to defendant(s) Dennys Rodriguez. (O'Connor, Shannon) (Entered: 08/17/2012)
08/27/2012	42	RESPONSE to Objection to Findings and Recommendation 40 by Attorney Martin J. Conboy, IV as to defendant(s) Dennys Rodriguez. (Conboy, Martin) (Entered: 08/27/2012)
08/30/2012	43	MEMORANDUM AND ORDER as to Dennys Rodriguez (1) – The defendant's motion to suppress, Filing No. 23, is denied. The defendant's objections to the F&R, Filing No. 40, are overruled; and the F&R of the magistrate judge, Filing Nos. 34 and 37, is adopted in its entirety. Ordered by Judge Joseph F. Bataillon. (TEL) (Entered: 08/30/2012)
09/28/2012	56	TEXT MINUTE ENTRY for proceedings held before District Judge Joseph F. Bataillon as to defendant Dennys Rodriguez. Hearing held in Omaha. Change of Plea Hearing held on 9/28/2012. Pleaded guilty to count I of the Indictment. Plea

		accepted. Plea Agreement not approved at this time, pending review of Presentence Investigation. Sentencing on 1/4/2012 at 1:00 p.m. Present bond continued. Courtroom Deputy: Kathy Griess. Reporter: Rogene Schroder. Appearance for Plaintiff: Martin J. Conboy, IV; For Defendant: Shannon P. O[']Connor, FPD. No interpreter used during hearing. Time Start: 2:17 PM; Time Stop: 2:37 PM; Time in Court: 20 Minutes. (KMG) (Entered: 09/28/2012)
09/28/2012	59	PLEA AGREEMENT as to defendant Dennys Rodriguez. (GJG) (Entered: 09/28/2012)
01/04/2013	77	TEXT MINUTE ENTRY for proceedings held before District Judge Joseph F. Bataillon as to defendant Dennys Rodriguez.Sentencing held on 1/4/2013. Hearing held in Omaha. Plea agreement accepted. Defendant is sentenced to the custody of the Bureau of Prisons for a term of 60 months. Supervised release for a term of 4 years. Special assessment in the amount of $100.00. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal. Defendant released pending execution of

sentence of imprisonment on same terms and conditions as previously released. Courtroom Deputy: Kathy Griess. Reporter: Rogene Schroder. Appearance for Plaintiff: Martin J. Conboy, IV; For Defendant: Shannon P. O[']Connor, FPD. No interpreter used during hearing. Time Start: 1:10 PM; Time Stop: 1:18 PM; Time in Court: 8 Minutes. (KMG) (Entered: 01/04/2013)

01/04/2013 83 JUDGMENT as to Dennys Rodriguez (1). The Defendant pleaded guilty to count I of the Indictment and is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months; followed by four (4) years of supervised release with special conditions; $100.00 Special Assessment. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal. Ordered by Judge Joseph F. Bataillon. (4 Certified copies to USM)(AOA) (Entered: 01/07/2013)

01/17/2013 87 NOTICE OF APPEAL regarding Order on Findings and Recommendations, Order on Objection to Findings and Recommendation, Order on Response to Objection To Findings and Recommendation, Order on

Motion to Suppress,[ ] 43 by Attorney Shannon P. O'Connor as to defendant(s) Dennys Rodriguez. (O'Connor, Shannon) (Entered: 01/17/2013)

Relevant Docket Entries for the United States Court of Appeals for the Eighth Circuit

01/23/2013	CRIMINAL case docketed. [3997083] [13-1176] (JMH)
01/23/2013	CLERK ORDER: The Federal Public Defender is hereby appointed to represent appellant in this case. [3997109] [13-1176] (JMH)
02/11/2013	RECORD FILED – SUPPRESSION TRANS, 1 volumes [sic], Location STL, Comments: Copy do not return to the District Court at end of case, Source Location: USDC / NE, Dt. of Proceeding/Hearing: 07/10/2012, No. of Pgs.: 83, Court Reporter: Wilkey, Diana [4003760] [13-1176] (STL)
02/11/2013	RECORD FILED – SENTENCING TRANS, 1 volumes [sic], Location STL, Comments: Copy do not return to the District Court at end of case, Source Location: USDC / NE, Dt. of Proceeding/Hearing: 01/04/2013, No. of Pgs.: 7, Court Reporter: Schroder, Rogene [4003762] [13-1176] (STL)
02/11/2013	RECORD FILED – SEALED PSI REPORT, 1 volumes [sic], Location STL, Comments: 1 volume, 3 copies of Sealed Psi Report, Sentencing Recommendation, and Sealed Statement of Reasons, Source Location: USDC / NE [4003764] [13-1176] (STL)

05/21/2013	BRIEF FILED – APPELLANT BRIEF filed by Mr. Dennys Rodriguez. w/service 05/20/2013, Length: 21 pages 10 COPIES OF PAPER BRIEFS FROM Dennys Rodriguez due 05/28/2013 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS. Appellee brief due on 06/11/2013. [4037780] [13-1176] (DMS)
06/07/2013	BRIEF FILED – APPELLEE BRIEF filed by United States of America, w/service 06/07/2013, Length: 20 pages 10 COPIES OF PAPER BRIEFS FROM United States of America due 06/12/2013 WITH revised certificate of service for paper briefs. Dennys Rodriguez's reply brief due 06/14/2013. [4043447] [13-1176] (DMS)
11/21/2013	ARGUED & SUBMITTED in Omaha to Judges Roger L. Wollman, Steven M. Colloton, Raymond W. Gruender on 11/21/2013. Mr. Shannon Patrick O'Connor for Appellant Mr. Dennys Rodriguez. Mr. Martin Conboy, IV for Appellee United States of America. Rebuttal by Mr. Shannon Patrick O'Connor for Mr. Dennys Rodriguez RECORDED [4098596] [13-1176] (TAB)
01/31/2014	OPINION FILED – THE COURT: Roger L. Wollman, Steven M. Colloton and Raymond W. Gruender AUTHORING JUDGE: Roger L. Wollman (PUBLISHED) [4119286] [13-1176] (DMS)

01/31/2014	JUDGMENT FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. – ROGER L. WOLLMAN, STEVEN M. COLLOTON and RAYMOND W. GRUENDER – Hrg Nov 2013 [4119291] [13-1176] (DMS)
05/02/2014	U.S. Supreme Court Notice of cert filed in the Supreme Court on 05/01/2014, case No. 13-9972 [4156049] [13-1176] (SRD)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. DENNYS RODRIGUEZ, Defendant.	CASE NO. 8:12CR170 **MOTION TO SUPPRESS EVIDENCE AND REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT** (Filed June 19, 2012)

The Defendant, Dennys Rodriguez, by and through his attorney, Shannon P. O'Connor, moves the Court for an order suppressing all evidence and statements obtained as a result of the illegal stop, detention, and search of his vehicle on March 27, 2012. In support of this motion, the Defendant states as follows:

1. On March 27, 2012, Defendant's vehicle was stopped by Valley Police Department Officer Morgan Struble for allegedly driving on the shoulder and failing to maintain a lane. The stop was not supported by probable cause that a traffic violation had occurred. Any evidence obtained as a result is inadmissible.

2. Even if the initial stop of Defendant's vehicle was justified, the detention of Defendant was unduly prolonged in the absence of reasonable articulable

suspicion. Any evidence obtained as a result is inadmissible.

3. Officers searched Defendant's vehicle without a search warrant or probable cause. Any evidence obtained as a result of the search is inadmissible fruit.

WHEREFORE, Defendant moves the Court for an order suppressing all evidence and statements obtained as a result of the illegal stop, detention, and search of his vehicle on March 27, 2012. The Defendant further requests an evidentiary hearing and oral argument.

Respectfully submitted,

DENNYS RODRIGUEZ, Defendant,

By: s/ Shannon P. O'Connor

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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. DENNYS RODRIGUEZ, Defendant.	)	CASE NO: 8:12CR170 Omaha, Nebraska July 10, 2012 9:45 a.m.

TRANSCRIPT OF MOTION
TO SUPPRESS EVIDENCE HEARING
BEFORE THE HONORABLE F.A. GOSSETT
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: Martin Conboy
Assistant United States Attorney
1620 Dodge Street
Suite 1400
Omaha, NE 68102

For the Defendant: Shannon O'Connor
Assistant Federal Public Defender
222 South 15th Street
Suite 300N
Omaha, NE 68102

Proceedings recorded by electronic sound recording, transcript produced by transcriptionist.

{2} (Whereupon the following proceedings took place in open court at 9:45 a.m.:)

(Call to Order of the Court.)

THE COURT: 8:12CR170, United States of America versus Dennys Rodriguez.

Counsel for the Government, please identify.

MR. CONBOY: Thank you, Your Honor. Martin Conboy on behalf of the United States. With me at counsel table is Morgan Struble. He's the initiating officer in this matter.

THE COURT: For the Defendant, who's present?

MR. O'CONNOR: Shannon O'Connor.

THE COURT: The matter is before the Court on a motion to suppress. It's document number 23. I've read the motion and accompanying briefs.

Does the Government have any opening motions or statements?

MR. CONBOY: No, Your Honor.

THE COURT: Defendant?

MR. O'CONNOR: No, sir.

THE COURT: Government may call their first witness.

MR. CONBOY: Thank you. At this time I would call Officer Morgan Struble.

MORGAN STRUBLE,
PLAINTIFF'S WITNESS, SWORN

THE COURT: Government's witness.

{3} MR. CONBOY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CONBOY:

Q. Sir, can you please repeat your name.

A. Morgan Struble.

Q. And how are you employed?

A. I'm a police officer with the Valley Police Department.

Q. And how long have you been an officer with the Valley Police Department?

A. End of February, beginning of March.

Q. And how long have you been a law enforcement officer?

A. Since April 2010.

Q. And do you have any duties being a police officer?

A. Yes, I do.

Q. And what are those duties?

A. Traffic enforcement, criminal investigations, I'm a K-9 handler, narcotics investigations.

Q. Is that it?

A. Do you want me to keep going?

Q. No.

A. Okay.

Q. Does that summarize it?

A. That – for the most part, yes.

Q. And were you working as a Valley Police Department officer on March 27, 2012?

{4} A. Yes.

Q. And if I can direct your attention to approximately 12:06 p.m. – excuse me, it would 12:06 a.m. on March 27, 2012, do you recall approximately where you were located?

A. Yes.

Q. And where was that?

A. I was traveling westbound on Highway 275.

Q. Where at on Highway 275?

A. Start near the Meigs Street exit –

MR. O'CONNOR: Which street exit?

THE WITNESS: Meigs, M-e-i-g-s.

MR. O'CONNOR: Thank you.

BY MR. CONBOY:

Q. Is that by any major thoroughfares?

A. Dairy Queen.

Q. Is that by any busy streets, main streets?

A. Meigs? No. I mean it's just an intersection with Highway 275. It's just outside of Waterloo.

Q. Okay. And approximately [at] that location, did you happen to be involved with the traffic stop?

A. Yes.

Q. And where was the traffic stop initiated?

A. Highway 275 and 276th Street intersection.

Q. And what kind of vehicle was it that you stopped?

A. It was a Mercury Mountaineer.

{5} Q. And what was the – Did you make any observations that caused you to stop the vehicle?

A. The vehicle drove onto the shoulder and then jerked back onto the roadway near 276th Street.

Q. Okay. And where did you – If I could have you break that down a little bit. What direction were you traveling?

A. Westbound.

Q. And was the – Where was the Mountaineer in relation to you?

A. It was on the what you would call outside lane, and I was inside lane [sic] a couple car lengths back from it.

Q. So the vehicle was also traveling westbound?

A. Yes, same direction as me.

Q. And you indicated that it jerked in some fashion. Can you describe that in more detail?

A. It began veering off to the outside lane and to the shoulder. Then at some point as the passenger side tires went over the line, it jerked back over into the lane of traffic.

Q. Was the action, going onto the shoulder, was that sudden or did it happen over a period of time?

A. It was not as sudden as the correction to get back into the lane of traffic. It was more of a veer and then – it appeared to me like the driver wasn't paying attention, watching his mirrors or something to that effect, and then looked back at the road. It appeared that he realized he was {6} veering off of the road and then corrected quickly.

Q. And how far over the line onto the shoulder did the Mountaineer pass?

A. I know the driver side tires at least crossed the line. As far as feet and inches, I'm not sure.

Q. And do you recall approximately how long the vehicle traveled on the shoulder?

A. No. No, I mean, several seconds.

Q. And after conducting a traffic stop, did you have contact with the occupants?

A. I did.

Q. And were you able to identify the occupants?

A. I was.

Q. And who were the occupants?

A. The driver was Dennys Rodriguez, and the front passenger and only other passenger was Scott Pollman.

Q. And during this initial contact, did you make any observations?

A. I did.

Q. What observations did you make?

A. My first initial observation was the overwhelming odor of air freshener coming from the vehicle.

Q. And you call this an "overwhelming." Do you have a basis for that?

A. Yes.

{7} Q. And what is that basis?

A. I stop a lot of vehicles, different people, amounts of people, with different agendas, and typically, in my experience, the overwhelming air

freshener odor is a common attempt to conceal an odor that they don't want it to be smelled by the police.

Q. And during this contact did you observe both Rodriguez and the passenger Mr. Pollman?

A. Yes.

Q. Did you make any observations?

A. Yes.

Q. And what did you observe?

A. I observed that Pollman was nervous. I made a passenger side approach on the vehicle, so I approached the passenger side as opposed to the driver side. I observed Scott Pollman smoking a cigarette staring straight ahead. He had his hat pulled down real low over his eyes and would not make eye contact or look at me.

Q. And would it be safe to say that during most contacts people appear to be nervous?

MR. O'CONNOR: I object to foundation.

THE COURT: Sustained.

BY MR. CONBOY:

Q. How would you characterize his nervousness? Was it normal or was it different than what you normally see?

{8} MR. O'CONNOR: I again object as to foundation. The question as to whether "normal," I think that needs to be explained.

THE COURT: Sustained.

BY MR. CONBOY:

Q. What did you do during this normal – Excuse me. What did you do during this initial contact?

A. I spoke with the driver, Dennys Rodriguez. I advised him for the reason of the stop, asked him if there was a reason for the violation. Then I asked him to gather his documents.

Q. Did you talk to Mr. Rodriguez about the purpose of the traffic stop?

A. Yes, I did.

Q. What did you talk to him about?

A. I asked him if there was a reason that he drove onto the shoulder.

Q. What did he say?

A. He stated that there was a large pothole back there on the roadway.

Q. And after you talked to Mr. Rodriguez, what happened next?

A. I asked him for his driver's license, registration and insurance for the vehicle.

Q. And then what happened?

A. He provided the documents, and I asked him if he would step out of the vehicle and come sit in my cruiser with me {9} while I conducted the records check.

Q. And then what happened?

A. He exited his vehicle. He met me at the rear of his vehicle. I asked him to just have a seat in the front passenger seat of my cruiser. He then asked if he was obligated to, and I advised him that he was not obligated to. Then he stated he would rather sit in his vehicle.

Q. And then what happened?

A. I returned to my cruiser, and I conducted a records check.

Q. Let me back up really quick. When he asked to sit in his vehicle while you did the checks, did you find this to be significant?

A. Yes.

Q. And what do you base this on?

A. I've stopped a lot of cars, and I've gotten [a] substantial amount of drugs out of vehicles, and I've never had anybody – I mean, in my law enforcement experience, I've never had anybody not want to sit in my vehicle with me.

Q. And then, I think, following that you indicated you went to the patrol vehicle and you ran their information?

A. Just Rodriguez's, yes.

Q. And did you make a second contact with the Mountaineer at some point?

A. Yes.

Q. And who did you talk to upon returning to the Mountaineer?

{10} A. Scott Pollman.

Q. And what did you talk to Mr. Pollman about?

A. I initially asked him for his driver's license or identification, and then I began asking him questions with regards to where he was coming from and where they were going.

THE COURT: I'm sorry, I lost who you were talking about with these questions, the passenger or the Defendant?

THE WITNESS: Scott Pollman, the passenger.

THE COURT: Okay. Go ahead, Mr. Conboy.

BY MR. CONBOY:

Q. And during this contact what did Mr. Pollman say to you?

A. Pollman stated that they were coming from Omaha, Nebraska, going back to Norfolk, Nebraska, and that they came to Omaha to look at purchasing a vehicle.

Q. And did you ask – Did you determine whether or not they had gone to Omaha and actually looked at the vehicle?

A. Did I determine that?

Q. Yes.

A. No.

Q. Did you ask Mr. Pollman if they did?

A. Yes.

Q. And did you ask him whether or not – Let me rephrase that.

Did you discuss with Mr. Pollman whether or not he had any information on the vehicle that he went to Omaha to look at {11} during this time?

A. Yes.

Q. And what did he say?

A. I asked him if he at least observed any pictures or if the seller had sent him any pictures prior to him driving all the way from Norfolk to see the vehicle, and he stated that he had not seen pictures of the vehicle.

Q. And was there any significance to any of this conversation that caught your attention?

A. Yes.

Q. And what was that significance?

A. It's just after midnight on a Tuesday. It just seemed suspicious to me to drive, you know, approximately two hours that late at night to see a vehicle sight unseen to possibly buy it. It just seemed abnormal to me. It's not something I would do.

Q. And how about the – Well, when you say sight unseen, does that mean drive – making the trip without having seen any pictures of the vehicle beforehand?

A. Pictures, yes. And then Pollman stated that the seller didn't have the title to the vehicle. It seems like something that would be confirmed before.

Q. And what did you do after speaking with Mr. Pollman?

A. I gathered his driver's license, and then I returned to my cruiser.

{12} Q. And during this period did you do anything else?

A. I requested a second officer, and I conducted a records check on Scott Pollman.

Q. And to be clear, do you recall approximately what time the traffic stop occurred?

A. Six after midnight.

Q. And do you recall approximately when you contacted a second officer?

A. I believe I called for a second officer, I believe, 19 after midnight, 19 minutes after midnight. And I believe the second officer was in [sic] route at 21 after midnight.

Q. And in your patrol vehicle what did you do?

A. I conducted a records check on Pollman, and I began to write a written warning for Rodriguez.

Q. And at some point did you have a third contact with the Mountaineer?

A. Yes.

Q. And what did you do?

A. I completed my written warning. I reapproached the vehicle for a third time. I issued a – I advised that it was just a written warning. I returned all the documents to both Rodriguez and Pollman. And I had Rodriguez sign the written warning, and then I handed him his copy of the written warning.

Q. Do you recall approximately what time you gave him the warning?

{13} A. I cannot. It would be a minute, two minutes after the written time on my written warning, whatever time that is.

MR. CONBOY: May I have a moment, Your Honor?

THE COURT: You may.

MR. CONBOY: May I approach, Your Honor?

THE COURT: You may.

BY MR. CONBOY:

Q. Officer Struble, you've just been handed a document. Can you tell the Court what that document is.

A. It's a copy of my warning citation that I issued Mr. Rodriguez.

Q. And if you review that document, would it help you recall approximately what time you issued the written warning?

A. Yes.

Q. And looking at that document can you tell the Court what time the written warning was issued?

A. 0025, 25 after midnight.

Q. And during the issuance of this ticket, and when you signed it with him, did you continue to talk to him about events pertinent to the purpose of the traffic stop?

A. In regards to?

Q. Explained the ticket to him, et cetera?

A. Yes. I advised him it's just a warning citation, that he didn't have to pay any fines or mail anything in. I, again, approached the vehicle on the passenger side, so I had to hand {14} my citation book

via Pollman to Rodriguez. He signed it. He then returned it. I ripped out his copy, handed him his copy, and went from there.

Q. What – How much time did it take you to explain the ticket to him and finish the purpose of the traffic stop?

A. Well, the time here on the warning citation is 25 after. That was the time as I was writing the citation, and that's about halfway down the citation. The time to explain it, hand it to him, I would probably – I'd say approximately 27 to 28 after, two to three minutes.

Q. And after the ticket was given to him and explained, what did you do next?

A. I asked Rodriguez if he had an issue with me walking my police service dog around the outside of his vehicle.

Q. And what did Mr. Rodriguez state to you?

A. He stated that he did have an issue with it.

Q. What happened next?

A. I instructed him to turn off his vehicle and step out of his vehicle.

Q. And what happened?

A. He stated that he was going to roll his windows up first.

Q. And did he?

A. Yes. I advised him he could do that.

Q. And then what happened?

A. He rolled his windows up, and he exited the vehicle. And {15} I instructed him to stand in front of my cruiser until a second officer arrived.

Q. And you indicated earlier that you are a K-9 officer. Did you have your K-9 with you that day?

A. I did.

Q. And what is your K-9's name?

A. Floyd.

Q. And is he a certified K-9 dog?

A. Yes.

Q. Do you consider him to be reliable?

A. Yes.

Q. And when was the last time he was certified?

A. The last time he was certified was March 2012, before – the first week of March.

MR. CONBOY: Your Honor, may I approach, please?

THE COURT: You may.

MR. O'CONNOR: I have no problems with stipulating that the dog is an expert and well-trained, and I'm not going to challenge – I'm not going to challenge here the dog's finding of the drugs.

THE COURT: All right. Mr. Conboy, you can react to that any way you wish with a question.

MR. CONBOY: Sure.

BY MR. CONBOY:

Q. Mr. – or Officer Struble, the certification for your dog {16} was given on March 21, 2012?

A. Yes, March 21st.

Q. And what is the difference between an indication and an alert?

A. An alert or alert behavior is the behavior that my dog shows when he detects the odor or odors he's trained to detect. An indication is the final response, which my dog is a passive indication [sic], which means he sits whenever he gets as close to the source of the odor that he feels he can possibly get.

Q. And, you know, I apologize, but I – you said you were waiting for a second officer, correct?

A. Yes.

Q. And did one arrive?

A. Yes.

Q. And do you recall approximately what time that occurred?

A. Thirty-three after, I believe.

Q. And your K-9, is he present in your vehicle?

A. Yes.

Q. And he was there throughout the entire traffic stop?

A. Yes.

Q. And after the second officer arrived – who was that, do you recall?

A. It was Deputy Duchelus with the Douglas County Sheriff's Office.

Q. And after he arrived, how long did it take you to remove {17} your K-9 from the vehicle?

A. After Duchelus arrived, I spoke with Rodriguez, advised him what I was going to do, that I was going to walk my dog around the outside of his car. I approached the vehicle, advised Pollman, who was still in the Mountaineer, that I was going to walk the dog around the outside of the car. And then I retrieved my dog.

Q. How much time?

A. A minute, 45 seconds.

Q. And did you walk your K-9 around the vehicle?

A. Yes.

Q. And did he alert and indicate to the vehicle?

A. Yes, he did.

Q. And what happened next?

A. He alerted and indicated to the front passenger side door. I placed my K-9 in the back of my vehicle. I had Rodriguez sit in the back of Deputy Duchelus's cruiser. Then I had Pollman step out, and I had Pollman sit in the front seat of my cruiser while I conducted a hand search of the vehicle.

Q. How long after the drug sniff commenced did your K-9 indicate and alert to the vehicle?

A. It was halfway through my second pass. When I do a K-9 sniff of the vehicle, I start at the front, do a clockwise motion around. Once I make one pass around the vehicle, I turn counterclockwise. He began alerting at the rear of the vehicle {18} on the second pass, and then finally indicated at the front passenger door.

Q. So how much time?

A. Twenty seconds, 30 seconds.

Q. And approximately how long after the traffic stop ended do you think it took for your K-9 to indicate to Mr. Rodriguez's vehicle?

A. I would say seven, eight minutes tops. From the time I issued the written warning and returned their documents, to the time my dog was actually indicating on the vehicle, I'd say seven to eight minutes.

Q. And after your K-9 indicated to the vehicle, what happened next?

A. I returned him to my cruiser. Like I say, I had Rodriguez sit in the back of Duchelus's cruiser. I had Pollman sit in the front seat of my cruiser, and I conducted a hand search of the vehicle.

Q. And what was found?

A. A large bag of crystal methamphetamine.

Q. And it was field tested, correct?

A. Yes.

Q. Going back to Mr. Pollman during the initial contact, did you have an opinion whether or not Mr. Pollman was nervous or overly nervous?

A. Yes.

{19} Q. And what do you base that opinion on?

A. My contact with numerous, numerous other people on traffic stops. He was more nervous than your typical passenger in the vehicle. Typically passengers don't have anything to worry about because they're not driving. They didn't commit a violation.

MR. CONBOY: I have no further questions.

THE COURT: Mr. O'Connor.

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q. You started to list all of the things that you were responsible for. How many other officers are there in the Valley Police Department?

A. There's four full-time officers and approximately five part-time officers.

Q. So you do just about everything?

A. Yes.

Q. Okay. Now, where were you at when you first saw Mr. Rodriguez's vehicle on 275 on March 27th?

A. I believe I was just east of the Meigs Street intersection with 275, and I was in a turnaround median. That's when I first observed the vehicle drive by. I didn't notice any details about the vehicle until I was traveling the same direction. I believe I was sitting in the center median somewhere near – just east of Meigs Street on 275.

{20} Q. How long had you been sitting there?

A. Seconds in that median.

Q. From the median, were you on – were you traveling east on 275 and then go in the median?

A. And then went to – yes.

Q. Okay. And that was a matter of seconds?

A. No, it was, maybe, a minute. I mean, it wasn't a matter of seconds, but I was probably there for a minute. I hadn't been there very long.

Q. And what were you doing there? Watching traffic?

A. Yes and no. What I do is I'll go to the east and west side[s] of the city limits there and sit in the different medians and turnarounds and speeders and intoxicated drivers and so on.

Q. Can you give me a street number, if it works, the – we'll start with the eastern boundary of the city of Valley?

A. A street number?

Q. Uh-huh.

A. I don't know a street number for the eastern boundary of the –

Q. Describe to me what road or landmark or line or whatever is the eastern boundary of the city of Valley.

A. It's not a perfect square. It's kind of choppy. They've done some annexing. I mean, I guess are you asking where the city limit is on the highway?

Q. Sure.

{21} A. Okay. The city limits sign is just east – you know, saying entering Valley city limits is just

east of Meigs, if you're traveling westbound on Highway 275.

Q. Just east –

A. Of Meigs. About the area I was sitting.

Q. A mile? Quarter of a mile? Half a mile?

A. Oh, I don't know. Quarter mile. That's a guess.

Q. And why did you turn and follow Mr. Rodriguez?

A. Why did I turn and follow Mr. Rodriguez?

Q. Yeah. You were sitting in the median, you turned to go west with the direction Mr. Rodriguez's car was traveling?

A. Yes.

Q. And you – Were you following him? Was that the intent when you pulled out of the little U-turn thing to go west on 275?

MR. CONBOY: Objection, relevance.

THE COURT: Overruled. You may answer the question.

THE WITNESS: No, I was not following him.

BY MR. O'CONNOR:

Q. So – All right. Was he speeding or driving the speed limit to your knowledge, guesstimate?

A. Yes. He wasn't speeding. I mean, I was doing the speed limit, and he wasn't leaving me.

Q. Okay. On Highway 275, what is the approximate distance from the eastern to [the] western boundary of Valley?

{22} A. Oh, a couple miles.

Q. How much?

A. A mile, maybe two miles, three miles. I'm not sure. I've never measured it.

Q. How many times have you been on that highway doing what you were doing now looking for speeders and people that violated the law, how many times had you done that over your –

A. Do you want like a number?

Q. Sure. Five, 10, 15, 100, 200, 500.

A. Oh, I'd say – Like I said, I'm fairly new to Valley Police Department, so not a whole lot of times. I would say, roughly, 10, 15, 20 times on the highway.

Q. In approximately a two-year period?

A. No. I've only been with Valley Police Department since the beginning of March.

Q. So you'd give an estimate of – tell me again, of what, how far do you think it was?

A. Anywhere from a mile to four miles. I'm not sure.

Q. Okay. Where –

A. It's a stretch. I mean, it's not a whole lot, but it's –

Q. Well, I'm just curious, because we're guessing time here down to six to eight minutes and sometimes seconds, and as close as you can come to a travel on the road is one to four miles?

A. Yeah. Are you wanting the western Valley city limits, is {23} that –

Q. Boundary to boundary.

A. Maybe we could get a map and measure it.

Q. Boundary to boundary.

A. Okay. The western Valley city limits [sic], I believe, is just on the west side of 276th Street, but the highway kind of curves, so it's – like I said, you'd have to look at a map to really understand the city limits. It's kind of choppy, and it's not clean or pretty by all [sic] means.

MR. O'CONNOR: Can I have just a second, Judge?

May I approach the witness?

THE COURT: You may.

BY MR. O'CONNOR:

Q. Officer, I do have some maps here –

A. Okay.

Q. – and I'm not sure whether it shows the city limits, so let me try something. Let's start with Defendant's Exhibit Number 102. It's basically a Google Earth map, and is there anything on there that you can show and mark where the city limits are?

A. Yes, on the east side. The images is not large enough to show the western city limits. It's a little further west.

Q. Let me show you Defendant's Exhibit 103. Do you see whether that –

THE WITNESS: That would about do it.

{24} MR. CONBOY: Your Honor, can I ask that the witness to pull his mic down. I can't hear him.

THE WITNESS: That will do it.

BY MR. O'CONNOR:

Q. Officer, on that exhibit can you put an X as to the eastern and western boundaries, and then drawing that on –

A. 103.

Q. – Exhibit 103.

A. This is just my guesstimate. I'm not approximate here. This is just from what I observe.

Q. Okay.

A. Would you like your exhibits?

Q. How long have you lived in Valley?

A. I don't live in Valley.

Q. Where do you live?

A. I live in Omaha.

Q. And you come in from Omaha to – on 275?

A. Yes.

Q. While we have it here, can you look at Defendant's Exhibit 103, and can you see on there where Meigs is at, where you were at when you turned around?

A. The turnaround is not on the picture here. It's just off the picture here, off the screen. It's just a gravel turnaround.

Q. May I look at that?

(25) A. Yeah.

Q. So it's further – assuming this is north on the –

THE COURT: Mr. O'Connor, what are we doing?

MR. O'CONNOR: Judge, I want to establish where he was at and how long he followed the –

THE COURT: Why don't you ask him that then?

MR. O'CONNOR: – the Defendant, what distance.

Well, but he's saying that we're one to four miles, so I'm going to narrow it down –

THE COURT: No, you've never asked him how long he followed the Defendant. You've asked him where the city limits were, and you've asked him – You've never asked him how long he followed the Defendant and where he stopped him.

MR. O'CONNOR: Not yet.

THE COURT: Well, I guess, I'm having a problem with what the point of it all is.

MR. O'CONNOR: I'll finish that up here real quick.

Judge, here's the point. The point is I want to – I have the city limits. Now I want to know where he turned around, and then I can see distance, how far he followed him.

THE COURT: Okay. That's fine.

BY MR. O'CONNOR:

Q. When you say it's not on this map then, is it further to the –

A. It's further to the – where are we at here – This would {26} be north, further south and east. It's just off the screen here. It curves to the left, and there's a turnaround.

Q. Inside the city limits?

A. Actually, no, the turnaround is outside the city limits. It's the only – It's the next place – the turnaround before you hit Omaha.

Q. So it's just south of the X on the bottom right-hand corner –

A. Correct.

Q. – that's marked on Defendant's Exhibit 103?

A. Correct.

MR. O'CONNOR: I'd offer Defendant's Exhibit 103 into evidence.

THE COURT: Mr. O'Connor – or excuse me, Mr. Conboy.

MR. CONBOY: Can I have one second, Your Honor?

THE COURT: Sure.

MR. CONBOY: I don't have an objection to it.

THE COURT: [103] will be received for purposes of the motion, which is number 23, only.

BY MR. O'CONNOR:

Q. So when he passed you he was going the speed limit, approximately, which is how much?

A. The speed limit is 65. I believe he was doing a few miles under the speed limit.

Q. Okay. And you were at a dead stop when he went past you. {27} How long did you follow him from that dead stop until you saw him off the road with his car?

A. How –

Q. How long?

A. I'm sorry, I'm confused. A matter of – Are you asking me time or distance?

Q. How long in time?

A. I don't – I don't know. I don't know. I observed the violation just east of 276th Street in the city limits and conducted the traffic stop just as soon as I could pull in behind him and activate my lights after that.

Q. How far behind were you when you saw the violation?

A. Approximately three car lengths, four car lengths. I was in the opposite lane, so I wasn't in his lane of traffic. I was in the inside lane.

Q. So when you – we look at the map, however long we can determine what the distance is, you

caught up with him and were behind three or four car lengths?

A. Yes.

Q. So, obviously, you were going faster than he was?

A. Yes.

Q. If he's going 65 miles an hour and you're [at] a dead stop and get three or four car lengths behind him before you see him go off the road, you did – how fast were you going to catch up to him?

(28) MR. CONBOY: Objection, relevance.

THE COURT: What's the relevance, Mr. O'Connor?

MR. O'CONNOR: Well, I think it's important to know how far he followed him from the time that he saw him until he went off the road, and he said that he was just going in the direction, and I guess my point is that he was more than going in the direction. He had to catch up with the Defendant's vehicle. So he was following him for a reason. And the testimony was that he was just driving down the road when he went past. So he caught up with him for a reason.

THE COURT: I'll overrule the objection.

THE WITNESS: Now, what was your question?

THE COURT: I think you answered it.

THE WITNESS: Did I answer it? Okay.

BY MR. O'CONNOR:

Q. Now, you indicated on direct examination, and maybe I misheard it the first time. Did you say that the passenger – or that the driver wheel went over the line, and then you said the passenger wheels went over the line? I'm confused. We'll start with which wheels went over the shoulder line?

A. The passenger wheels. The passenger side tires.

Q. And he's driving in the right lane?

A. Yes, outside lane.

Q. And your description in the police report, it was "veered onto the shoulder and then jerked back quick"?

{29} A. Yes.

Q. When you talked to him, he told you that he had swerved for a pothole?

A. Yes.

Q. Would that be consistent with your definition of veering and then quickly jerking back onto the road?

A. No, not in the manner he did. No.

Q. What's different from him swerving as to miss a pothole and veering and then jerking quickly back onto the road?

A. Like I explained earlier, the veering was slow and steady. It appeared to me like he wasn't paying attention where he was driving. And then the correction, where he jerked back to the roadway, was quick. If he was going veer [sic] a pothole, the veer or the swerve would be quick and the correction would be quick, in my opinion.

Q. And your conclusion was that he was not paying attention?

A. Yes.

Q. And what do you base that on?

A. Based on the fact that he wasn't intoxicated and that, you know, like I said, it was a slow swerve with a quick correction, as opposed to a quick swerve and a quick correction, which I think would be consistent with trying to avoid an object or a hole.

Q. Okay. So we're not talking about intoxication at this point, because you had no idea when you were following him, {30} correct?

A. No.

Q. That's correct?

A. That's correct, yes.

Q. And so you catch up to him and you say "veer" and "jerk" back quickly?

A. Yes.

Q. And your report doesn't say anything as to the distance that he went, from the time that he crossed the line?

A. No.

Q. And your estimate now is how long?

A. I'm not – A few seconds, maybe one, two seconds. I'm not sure. I didn't count. I didn't measure.

Q. Okay. All right. So for whatever reason, the passenger wheels went over the white line for a period of two seconds, approximately?

A. Yes.

Q. So he veered onto the road and then jerked back quickly in approximately two seconds, fair?

A. What's that? Did you ask if that's what he did?

Q. I said – Yeah, if that was fair.

A. Like I said, the veer was slow – from the center lane – center of his lane, he began slowly veering towards the outside shoulder. From the time the actual tires went over the line to the time

where he, I believe, realized it and corrected was {31} approximately two seconds, yes.

Q. So you made contact with the driver and passenger after the stop by going up to the passenger window?

A. Yes.

Q. And you said you asked him why he was driving on the road? That was the term that you used?

A. Why he was driving on the road?

Q. Driving on the shoulder.

A. Yeah, I don't remember exactly what terms or words I used, but I asked him for his reason for the violation.

Q. Your report says reason for driving on the shoulder.

A. Okay.

Q. I want to know whether that's the word that you used?

A. I don't recall if that's the exact word I used or not.

Q. Do you recall any response from him as "I wasn't driving on the shoulder"?

A. I believe he did. I believe he initially said he didn't believe he did. Then I pointed out that it was,

you know, just back there just east of the intersection. Then he stated something to the effect of where that large pothole was. And I said I'm not sure, or something to that effect, and something about a pothole. And I believe later on in the traffic stop he again stated he didn't. I'm not sure. I don't recall.

Q. The question was whether he questioned the fact that he was driving on the shoulder? That word.

{32} A. Yes. I don't specifically it was [sic] driving on the shoulder, but yes, he did question the reason for the stop.

Q. But you're not sure whether the word "driving" was used, correct?

A. I'm pretty sure the word "driving" was used.

Q. So you go up to the car and get the license, registration[,] and insurance card, correct?

A. Yes.

Q. Did you notice anything about Mr. Rodriguez?

A. He was agitated.

Q. Okay. And at that point in time you said the passenger was quiet, kind of pulled the cap down over his head, and looked straight ahead?

A. Correct.

Q. Would it be fair his actions would be consistent with I don't want you to see who I am?

A. You could say that.

Q. And at that time you also smelled the – oh, I'm sorry, what's it called? Perfume, that's not the right word. What's –

A. Air fresheners?

Q. Yes.

A. I actually smelled the air fresheners before I even approached the window, but, yes, I smelled air fresheners, overwhelmingly.

{33} Q. What type of air fresheners were they?

A. Oh, I don't know.

Q. Can you give me an idea. Describe them.

A. It was a pleasant smell. I don't – Are you're asking for like a brand name? I don't know.

Q. I mean the source, was it a Christmas tree? Was it a –

A. Oh, I don't recall. I wasn't looking for air fresheners when I was searching, sir.

Q. So you don't know whether there were air fresheners in there or not?

A. I don't know if it was spray or – you're right, I don't know if there were trees or the little Glade vent. I'm not sure. I didn't – That's not – Like I said, it's not what I was looking for.

Q. After the arrest, the car was taken where? Back to the police station?

A. Yes, to the police garage and then to impoundment.

Q. Was it searched when you were at the police garage?

A. No.

Q. You asked Mr. Rodriguez to get out of the car and come to the – your police car, correct?

A. Yes.

Q. And you had said that you had never seen anyone turn down that request before?

A. Correct.

{34} Q. Have you ever had anyone ask whether they had to or not?

A. Yes, I have.

Q. And what did they ask?

A. Are you asking me for a specific incident or –

Q. No. No.

A. I've had people ask if they were in trouble, if they were getting a ticket, is there a reason I'm asking them to come sit in my car. And I explain to them that they're not obligated to, it's just easier for me. I don't have to stand on the side of the road, particularly during inclement weather, and there's no

bugs, and I can roll the windows up and turn the air conditioning off – or on and talk to them in a controlled, quiet environment, as opposed to semis blowing past.

Q. What was – Did you find – or you said you found this suspicious. Why?

A. What, that he wouldn't come back to my vehicle?

Q. Yes.

A. Because I had never had anybody encounter – I've never encountered anybody that was so adamant against not sitting in my cruiser with me.

Q. And what did that mean to you?

A. It just appeared suspicious to me.

Q. How so?

MR. CONBOY: Objection, asked and answered.

THE COURT: Overruled.

{35} THE WITNESS: How so? It appeared to me, after he asked if I could – if he could sit in his vehicle, it appeared to me that he did not want to leave his vehicle. He wanted to stay in close proximity to his vehicle. And in my experience on other traffic stops and incidents, that's a subconscious behavior that people concealing contraband will exhibit.

They don't want to distance themselves too much from their contraband.

Q. Well, with your experiences, the first guy that ever said no, I'm not getting in your car –

A. Yeah.

Q. So how can you say [in] your experiences if a person does that then it's consistent with hiding contraband? It's happened one time.

A. It's happened – I've had one person refuse to sit in my car, yes, but I've had numerous incidents where people subconsciously move closer to their contraband or their substances without even knowing they're doing it, just because that's what they're thinking about.

Q. When you smelled the air freshener stuff, did you find that suspicious?

A. As strong as it was, yes.

Q. And what did that mean to you?

A. Again, based on my experience, it's a common tactic for people to use overwhelming scents to attempt to cover up other {36} scents that they don't want the police to smell.

Q. What other scents were you suspicious of? Drugs?

A. Yes. On this particular incident are you asking, or –

Q. Yeah.

A. – other times?

Q. No, on this incident.

A. This incident, I mean, drugs, alcohol. Considering the violation, you know, it's –

Q. Okay. So drugs and alcohol. Had you smelled alcohol –

A. No, I did not.

Q. – in the car? Okay.

So it was suspicious to you that he was covering something up, maybe covering something up with the smell of the air freshener?

A. Yes.

Q. And the common reason for doing that would be to hide the scent of controlled substances?

A. Yes.

Q. And from this man, the only person that said I don't want to get in the car, you thought that that was suspicious because people that do that want to stay close to their contraband?

A. In my experience, yes.

Q. Okay. Were you suspicious at this point in time of what was going on? What was your suspicion at this point in time after you saw the passenger huddle down, smelled the air {37} freshener, and had

Mr. Rodriguez stay close to his car, what were you thinking at that time?

A. My sense is definitely heightened. My awareness level went up, and, yes, at that time I believed there may be, you know, criminal activity.

Q. Okay. What type of criminal activity was your suspicion at the time?

A. At the time? You know, I really hadn't made a decision at that point in time. Are we talking first contact, or are we talking – I mean, what point of the traffic stop are we talking about here?

Q. We're talking about when Mr. Rodriguez said he doesn't want to sit in the car, and that was the first person that ever did that that you had contact with. At that point in time, what was your suspicion?

A. At that point in time? Drugs or guns.

Q. Okay. And, of course, you would need the air freshener smell to mask drugs or guns, correct?

A. More so drugs, but, yes.

Q. More so drugs. Guns didn't have any – don't have any smell at all?

A. Well, not to us, but, you know, they have a slight – everything has a slight odor, but nothing that would jump out when you walk up to a window.

Q. Nothing that you would need to mask –

{38} A. No.

Q. Nothing you would need to mask the smell of, I would assume?

A. Unless you had an arsenal.

Q. And what you did when you went back was to run Mr. Rodriguez's name on the – help me out, what's it called?

A. MDC?

Q. Yeah. And what does that do?

A. That's just a criminal history check. It's – You know, make sure he didn't have any valid warrants or, you know, his license wasn't suspended or revoked.

Q. And if he has a – if he had a warrant, what would be your next action?

A. If he had a warrant?

Q. Yeah.

A. Ultimately –

MR. CONBOY: Objection, I'm sorry, relevance.

THE COURT: Sustained.

BY MR. O'CONNOR:

Q. He apparently had no warrants or violations or anything that caused you any concern, would that be accurate?

A. Not that I remember, no.

Q. So you made the traffic stop for driving on the road. You got the license and registration and insurance card. You then go back and run his name through the history to get somebody's {39} background. And you tell him before you get out of – before he gets out of the car the first time that you're going to write him a warning. Now, at that point in time, what prevented you from writing and issuing the warrant?

A. I didn't write a warrant.

Q. Not the warrant, the ticket. I'm sorry.

A. Oh, what time are you talking about?

Q. After you run Mr. Rodriguez's name through the identification – criminal identification. Why was a ticket not issued at that time?

A. Because I wanted to check the passenger to make sure he didn't have any warrants. I wanted to make sure I had everybody cleared before I did any paper writing.

Q. You were suspicious of the man and his actions when you first went to the car, correct?

A. Yes.

Q. You got the identification of Mr. Rodriguez at that time, correct?

A. Yes.

Q. When you go back the second time, you get the identification from the passenger, correct?

A. Correct.

Q. Because you wanted to run his record as well?

A. Correct.

Q. Why did you not take this person who you were suspicious {40} of, who ultimately you would run the record anyway, why did you not take that at the same time you took Mr. Rodriguez's identification?

A. I don't know. There was no particular reason.

Q. Part of the reason that you went back to talk to him is because of his suspicious behavior, correct?

A. No, I went back to talk to him for his identification and license. And then I began speaking with him while he was retrieving it, and I became more suspicious.

Q. But there's no reason at all that you can recall that you didn't take both licenses at the same time?

A. No.

Q. Okay. So you started talking to him – to, I'm sorry, the passenger?

A. Yes.

Q. And you asked him where he was coming from?

A. I asked him where they are coming from, yes.

Q. And he told you we went from Norfolk to Omaha to look at a car, and they were on their way back, correct?

A. Correct.

Q. Were you suspicious at that time?

A. Yes.

Q. Why?

A. Because it's after midnight on a Tuesday.

Q. Okay. What, based upon your training, caused you to be {41} suspicious?

A. The fact that it was midnight – after midnight on a Tuesday, and they drove over two hours to look at a vehicle in the dark.

Q. So your training says if someone is driving a car from a long distance to look at a vehicle and coming back at midnight, that, your training shows you, is suspicious?

A. No, common knowledge.

Q. Your common knowledge, right?

A. I believe so.

Q. You said that it seemed suspicious to you, correct?

A. Yes.

Q. So it's not your training and experience. You're putting your conclusion that it was suspicious, correct?

A. Well, and experience, yes.

Q. And after he told you he was going back from Omaha after looking at the car, and you were concerned about the time and looking at the car in the dark, what did he tell you about the trip when he was in Omaha? Anything?

A. What do you mean, details as far as the vehicle or where they were?

Q. Any details at all.

A. I think he advised that he looked at an older Ford Mustang, and the guy wanted $6,500 for it, but he hadn't seen any – I asked him if he had seen any pictures of it, he stated {42} no, and he stated that the seller didn't have title for it, and that's why he didn't buy it.

Q. Did you ask him how long he had been in Omaha?

A. I don't recall if I did or not.

Q. Your report doesn't indicate that you asked him how long he had been in Omaha, correct?

A. Correct.

Q. Your understanding is that he was buying it from an individual and not a dealer, correct?

A. Yes.

Q. Based upon the timing at 12:00 in the morning, that would make a difference to you, common sense, that he was not getting it from a dealer?

A. Yes.

Q. And that if he's getting it from an individual, it's more likely that you would look at it at later hours, correct?

A. (No audible response.)

Q. A dealer isn't open at 12:00 in the morning? Correct?

A. Yeah, correct. So what are you asking? I guess I'm confused on the –

Q. The question is whether, in fact, you think that a dealer is open at that late in the day? Are they out selling cars at 12:00 in the morning?

MR. CONBOY: Objection, relevance.

THE COURT: Sustained.

{43} BY MR. O'CONNOR:

Q. But your understanding is that he was buying it from an individual?

A. Yes.

Q. And your understanding was – or I guess you concluded that it was dark, it was 12:00 in the morning, and you thought it was strange looking at a car at that point in time, correct?

A. Yes.

Q. Do you know how long he had been in Omaha?

A. No, I do not.

Q. Do you know how long – or when he actually looked at the car that day?

A. No, I do not.

Q. Do you know whether in fact what he did after he look[ed] at the car?

A. I'm assuming they got Taco Bell, because there were wrappers in the back seat.

Q. Okay. Do you know when they got Taco Bell from your assumption?

A. No.

Q. Do you know whether they stopped and talked to anybody before they left the person selling the vehicle? Well, I guess here's the bottom line. You say you're concerned that it's at 12:00 in the morning, you think that's strange, but you don't find out as to when he looked at the car, right?

{44} A. When he actually looked at the vehicle, no, I didn't ask him what time he looked at the vehicle.

Q. So it would be less suspicious if he told you he looked at it at 4:00 in the afternoon?

A. I would probably then ask him what were you doing for the rest of the time.

Q. It would be less suspicious if he bought it at 4:00 in the afternoon?

A. A little.

Q. What do you mean "a little"?

A. It would be a little less suspicious.

Q. It would be a lot less suspicious at 4:00 in the afternoon as opposed to looking at a car at midnight, correct?

A. Are you asking me if it would be a lot less – I said a little less suspicious. I don't believe a lot less suspicious, but I believe a little less.

Q. What do you find suspicious about buying a car or looking at a car at 4:00 in the afternoon?

MR. CONBOY: Objection, relevance.

THE COURT: Sustained.

BY MR. O'CONNOR:

Q. What did you find suspicious about driving from Norfolk to Omaha to look at a car?

A. Well, one, the taxes are higher. Usually people leave Omaha to go get vehicles, not the other way around.

{45} Q. And based upon your training you are taught that it is significant the fact that somebody drives from one city a fair distance to another city to look at a car?

A. No, we didn't have a class covering long distance automotive purchasing.

Q. So again, that's based upon your personal experience, correct?

A. And professional experience, correct.

Q. You said – Were you suspicious that they went to Omaha to look at a Ford Mustang that the guy wanted $6,500 for and did not come back with the car?

A. Yes, or at least documentation or paperwork of purchase.

Q. Well, you said he didn't purchase the car, correct?

A. Correct.

Q. Why was that suspicious?

A. He stated that the owner did not have a title for the vehicle and that he had not seen any pictures of the vehicle prior to driving down there. It just seems like a long distance to drive without confirming

that the owner had the title or at least seeing pictures via e-mail. I mean, technology these days, it's pretty easy. It just seemed suspicious to me.

Q. Suspicious to you.

A. Yes. I was the one conducting the traffic stop.

Q. But I mean, it's not suspicious because of your training, {46} it's suspicious because of what you concluded?

A. Based on my training and experience, people hauling drugs in their vehicles often don't think of a good story when they get stopped.

Q. So one of the reasons you were asking these questions of the passenger was to follow up on your suspicions that these folks may be involved in dealing drugs?

A. Yes.

Q. Started with smelling the strong odor of the air freshener?

A. Yes.

Q. And that was before you even get to the people in the car?

A. Yes.

Q. Did you ask them whether they had any money or not to buy the car?

A. I don't believe I did.

Q. Did you ask Mr. Rodriguez what he was doing in Omaha, the purpose of his trip?

A. Yes. I asked them both when I approached the vehicle, and that's when they – Pollman stated that they were going to look at a vehicle – or [were] coming back from looking at a vehicle.

Q. I thought you said that's when – that conversation was when you went back and talked to Mr. Pollman after you ran Mr. Rodriguez's name in the computer?

A. Yes, that is when the conversation occurred, when I was {47} retrieving Pollman's identification to conduct a records check on him.

Q. Your report says you had the conversation with Pollman.

A. I was speaking to both of them, but Pollman answered all the questions, yes.

Q. So based upon that conversation that you found suspicious of guys [sic] going to look at a car in Omaha and then driving back to Norfolk when you stopped them at midnight, you found that suspicious that these people may be carrying drugs?

MR. CONBOY: Objection, asked and answered.

THE COURT: Overruled. You may answer the question.

THE WITNESS: After speaking with the occupants of the vehicle and –

THE COURT: Step up to the microphone, please.

THE WITNESS: After speaking with the occupants in the vehicle and corroborating everything that I have observed, yes, I was suspicious of criminal activity.

BY MR. O'CONNOR:

Q. So you go back after talking with Mr. Pollman and – go back to your car and run his name through the same system to see if he had any warrants, correct?

A. Correct.

Q. And at that point in time you called for a backup at 12:19 in the morning?

A. Correct.

{48} Q. And this was while you were back running Pollman's name through the system?

A. Correct.

Q. And what time did the backup arrive?

A. On location? I believe it was 33 after.

Q. Okay. And, I'm sorry I don't remember, about what time did you take the dog around?

A. Approximately one minute after backup arrived.

Q. Okay. I want to go back real quick. If you made the same stop at the same time of day and the passengers were on their way to Omaha, as opposed to coming back, and they had $6,000 cash on them, would you have found that suspicious?

MR. CONBOY: Objection, relevance, calls for speculation.

THE COURT: Sustained.

BY MR. O'CONNOR:

Q. So after you made the decision that you were going to search the car, you told both passengers to exit the vehicle?

A. No. Rodriguez was already out of the vehicle.

Q. You told him to stay back by your car while the dog was doing his search?

A. Yes. I told him to stand back with the deputy at the front of my cruiser.

Q. So he was – I'm sorry?

A. At the front of my cruiser is where he stood with the {49} deputy.

Q. And I'm going to assume that you told him to stand in front of the cruiser and he was standing by the deputy, that it certainly appeared that he was not free to leave at that point in time?

A. No, he was not free to leave.

Q. And he did say to you that he did not agree with you walking the dog around the car, correct?

A. Correct.

Q. I'm going to go back just a second and real quick, before you even asked him about whether he had any problem with you running the dog around the car, you had returned his identification and all of the other papers that you took?

A. And his copy of the written warning.

Q. As well as the identification to Mr. Pollman?

A. Correct. All the documents were returned.

Q. And then you asked about the dog?

A. Yes.

Q. Why did you do it in that sequence, based upon your training and experience?

A. Why did I do – Why did I ask about the dog after I returned all the documents?

Q. Yes.

A. So they had all their documents back and a copy of the written warning. I got all the reason for the stop out of the {50} way and returned all the documents, made sure they had everything, verified they had everything, got him his copy, advised him it was just a written warning, took care of all the business.

Q. Based on your training –

A. Okay.

Q. – why do you wait to ask for the dog after you return all the documents to the individuals?

MR. CONBOY: Objection, form of the question and relevance.

THE COURT: Overruled. You may answer the question.

THE WITNESS: I'm kind of confused on what you're asking. Why do I wait until I return all the documents?

BY MR. O'CONNOR:

Q. Well, let's do it this way. Are you trained to ask for a search or ask for your dog to go around after all of the documents have been returned and it appears that the individuals are free to go?

A. If you're asking for consent to search, then, yes, the subject would have to be free to go. But I was going to walk my dog around the vehicle regardless whether he gave me permission or not.

Q. And you decided that at 19 minutes after midnight when you called for backup?

A. Well, that's when I called for backup, yes.

{51} Q. And the reason you called for backup is you needed help when you conducted the walkaround by the dog?

A. Yes. There were two people involved, and I wanted a second officer there for officer safety.

Q. Did you have the keys at that point in time – at any point in time? The keys to Rodriguez's car?

A. After the K-9 indication I had the keys.

Q. It would be fair – Would it be fair to assume that you were still conducting the traffic stop at 19 minutes after midnight when you called for help?

A. Yes. I was conducting a records check at that time.

Q. So I would assume if you're still doing your traffic stop, warning ticket, that these folks were not free to leave?

A. No, they were not free to leave.

Q. So from the time that you called at 12:19 in the morning until the dog alerted, they were not free to leave, correct?

A. Rephrase – From the time I stopped them to the time – are you saying the dog alerted and indicated?

Q. No, the question was at 12:19 when you called for backup –

A. Okay.

Q. – to be there when you walked the dog around, from that time until the dog alerted, it's fair to conclude that they were not free to leave?

A. Yes.

{52} Q. Now, the traffic law. You have training in the law as to the rules of the road under the statutes of Nebraska, I would assume?

A. Yes.

Q. Are you confident that you pretty much know the violations of the rules of the road in the state of Nebraska?

A. That's a loaded question. No, I don't know all of them. And I don't know the particulars of each – I mean, I don't know word for word each statute or the numbers, no. I have a statute book in my vehicle that if I need to reference, I can.

Q. The crime itself, and I'm –

A. Driving on the shoulder?

Q. I'm sorry?

A. Driving on the shoulder or possession of methamphetamine?

Q. Rules of the road –

A. Oh, okay.

Q. – period. The question is do you feel comfortable that you know, not word for word, not statute number, do you know the violations of the rules of the road in the state of Nebraska, that's the question?

A. Yes.

MR. CONBOY: Objection, relevance.

THE COURT: What's the relevance, Mr. O'Connor?

MR. O'CONNOR: Well, we're going to get into the violation, why he thought it was a violation.

{53} THE COURT: How are you going to do that? He thought it was a violation. That's all that's required.

MR. O'CONNOR: But I'm going to get into whether it was, in fact, a violation or not.

THE COURT: What relevance is that?

MR. O'CONNOR: Well, there's got to be probable cause why he stopped it and why he –

THE COURT: His testimony is he believes that there's a violation – he believes there's a violation. Do you want to try to talk him out of the fact he believed there was a violation?

MR. O'CONNOR: No. He's got to have a reasonable basis for that – believing that's a violation.

THE COURT: But that's what he's testified to.

MR. O'CONNOR: But I need further cross-examination. Just because he's –

THE COURT: Go ahead and ask the questions, but I don't think it's relevant.

MR. O'CONNOR: Okay.

THE COURT: The question isn't whether there's a violation. The question is whether the officer believed there was a violation or not. I don't try the violation.

MR. O'CONNOR: Subjectively?

THE COURT: I don't try the violation at all.

MR. O'CONNOR: Well, I –

{54} THE COURT: Why would I try – I mean, I've never tried a violation in a preliminary hearing or in a motion to suppress in 31 years. Why would I try the violation?

MR. O'CONNOR: Because there's got to be a violation.

THE COURT: There does not have to be a violation.

MR. O'CONNOR: No, Judge, I think that the law is that the subjective belief of the officer is not relevant.

It's what a reasonable officer under all of these circumstances understands what the law is, not his understanding. I think there's a general intent, and that's why I think it's important.

THE COURT: We differ. Go ahead and ask the question.

BY MR. O'CONNOR:

Q. You gave him a ticket for the actions that you've already testified to, correct?

A. No, I gave him a warning citation.

Q. You gave him a warning citation for the – his actions on the road that you've already described?

A. Yes.

Q. And you believe that is a violation of driving on the shoulder of the road?

A. Yes.

Q. Based upon your training, experience and education, have you learned that there's a definition of driving on the (55) shoulder?

MR. CONBOY: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Like I said, I don't know word for word what the statute says. I know that you can't drive on the shoulder.

BY MR. O'CONNOR:

Q. And any time wheels cross that line is driving on the shoulder? That's your conclusion?

A. Yes, the tires are moving on the shoulder. Failure to maintain lane, driving on the shoulder, I mean, they're not within their lane of traffic.

Q. Okay. Failure to remain – or to maintain your lane of traffic, that was the other reason for the violation?

A. No. The violation was driving on the shoulder.

Q. Okay. So not the failure to maintain –

A. No. Well, he –

Q. – the lane.

A. – wasn't maintaining his lane.

Q. Okay. So –

A. By driving on the shoulder.

Q. Okay. So the driving on the shoulder was the crime that was committed?

A. Was the violation.

Q. Okay. So failure to maintain lane was not part of the {56} ticket?

A. I may have put it on there. I don't recall.

Q. Why would you have put it on there?

A. Because he was failing to maintain his lane.

Q. Is that the reason that he was stopped?

A. I stopped him for driving on the shoulder.

MR. O'CONNOR: Can I just have a second here, Judge, to –

THE COURT: You may.

MR. O'CONNOR: – collect my thoughts, because I think I'm done.

THE COURT: Sure. We probably need a break here pretty soon anyway, then we'll come back after lunch.

MR. O'CONNOR: I think that's all the questions I have, Judge.

THE COURT: Mr. Conboy?

MR. CONBOY: I could be brief, Your Honor, if you want me to –

THE COURT: Oh, I'm not ready for a lunch break yet. Go ahead. I just don't know where we're going and how many witnesses we have.

REDIRECT EXAMINATION

BY MR. CONBOY:

Q. Quickly, Officer Struble, I think earlier you testified to the actions that Mr. Pollman described to you. They seemed {57} suspicious because of common knowledge. Did you mean common sense or –

A. Common sense.

Q. Okay. There's also discussion about whether or not you knew the time frame of when Mr. Rodriguez and Mr. Pollman were in Omaha. Do you recall that?

A. I do.

Q. And do you recall –

THE COURT: Mr. Conboy, I'm sorry, I missed the first part of that question. Would you repeat it for me, please. I don't know why. I just spaced it out.

MR. CONBOY: Sure.

BY MR. CONBOY:

Q. You recall the conversation you had during cross-examination about when Mr. Rodriguez and Mr. Pollman were in Omaha?

A. Correct.

Q. And do you recall whether or not during the contact with Mr. Rodriguez and Mr. Pollman whether or not either of them said they just came from Omaha after looking at a vehicle?

MR. O'CONNOR: Objection, asked and answered on cross.

THE COURT: Sustained.

BY MR. CONBOY:

Q. With regards to the probable cause for the traffic stop, {58} it was discussed whether or not – it was discussed that the Mountaineer veered and jerked back onto the road. Do you recall that?

A. Yes.

Q. Do you recall whether or not the Mountaineer slowed down or applied it brakes or anything of that nature?

A. When it swerved and veered?

Q. Correct.

A. No. I don't believe it did.

Q. And is your vehicle clearly marked as a K-9 patrol vehicle?

A. No. It does not have K-9 on it. It's a clearly marked patrol vehicle. It says police, but it does not have any K-9 markings. I don't have my own cruiser. We share cruisers.

Q. And do you recall whether or not you talked to Mr. Pollman or Mr. Rodriguez about you calling for any backup during the traffic stop?

A. When I had Rodriguez step out of the vehicle – After I had returned the documents and issued him his written warning, I asked him to step out of the vehicle. He said he was going to roll his window up. I said that's fine. He got out and stood in front of my vehicle, and I said we're just waiting for another officer to arrive.

Q. Okay. But that didn't occur until after the traffic stop itself ended, correct?

{59} A. Correct.

MR. CONBOY: I have no further questions, Your Honor.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: No, sir, I don't think so.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Mr. Conboy?

MR. CONBOY: Your Honor, I have no further evidence at this time.

THE COURT: Mr. O'Connor, how do you wish to proceed?

MR. O'CONNOR: I have no evidence to present, Judge.

THE COURT: Let's take about a 10-minute break, and then we'll hear argument, and then we'll proceed. Ten minutes.

(A recess was taken.)

THE COURT: We're back on the record in 8:12CR170, and the parties are present and counsel are present.

Mr. O'Connor, we talked just a moment off the record when I came back in about some clarification of the record and that you might want to offer some exhibits.

MR. O'CONNOR: My understanding is one of the exhibits, I don't remember the number, Judge, was offered and accepted.

THE COURT: [103].

MR. O'CONNOR: [103]. And do you have –

THE COURT: [101] and 102.

(60) MR. O'CONNOR: Yes, I would offer those as well.

THE COURT: Mr. Conboy, any objection?

MR. CONBOY: No objection.

THE COURT: [101], 102 and 103 will all be received for purposes of the record on number 23, which is the motion to suppress.

Now, I understand where the burdens lie in this matter, but, Mr. O'Connor, why don't you first recite to us what you believe to be the issues that should be considered by the Court. We'll allow Mr. Conboy to respond, and then you may close.

MR. O'CONNOR: Judge, I'm going to attempt to do this. I'm not so sure that it's a little bit complicated, and after you hear it, I'd be more than happy to take some time to do a post-hearing brief, but you can determine that after we're done arguing here.

There has to be probable cause to make the stop. I think that's why driving on the road is important. That's the violation, and that's the reason that he was stopped, the only reason for – or the only violation he was given a ticket for.

So we have the driving on the road. There are two –

THE COURT: The shoulder.

MR. O'CONNOR: The shoulder.

THE COURT: I just don't want to get the record confused.

{61} MR. O'CONNOR: Yeah. No, please, Judge, any time I do that, you can correct me.

There are two cases, and I wish would have brought a copy, but I didn't, that come out of this district. They are Judge Thalken cases and up to Judge Bataillon. There are to [sic] cases that involve – Both cases involve the same incident of driving on the road – Judge, you're shaking your head. Are you familiar with them?

THE COURT: (No audible response.)

MR. O'CONNOR: Okay.

That, I think, is where the issue is, and you have – may very well even on the bench when questions like this come up, I'm not sure, but there's the Supreme – or the Nebraska case, district court case as well out of Buffalo County that made the conclusion

that the driving on the shoulder statute is for a thoroughfare and, basically, people driving on there as opposed to people who unintentionally crossed that white line, even for a very brief period of time. And since that is the reason behind the Nebraska statute, I don't think the federal courts can get involved at all as to whether this was a crime to look at Nebraska law.

Now, there are cases that talk about this type of thing and okay – seem to okay driving on the road – or driving on the shoulder in these circumstances. Most of these case[s] involve yet another offense. Most of these cases also {62} involve other reasons for making the stop, such as suspicions of being an impaired driver. But you have the cases and, I think, the very well reasoned decisions in Bataillon's and Thalken's courts as to driving on the shoulder.

Let me say what makes common sense to me, and that really doesn't make any more difference whether it's common sense to me, rather than it's common sense to the officer as to what was suspicious. What's common sense to me is you're not supposed to drive on the shoulder. You're not supposed to drive a vehicle, you're not supposed to drive a car, you're not supposed to do anything driving on the shoulder. Crossing the white line for an extremely brief period is not the reason for the statute. It's not.

It is a reason that law enforcement officers have to pull people over. It is the reason, or perhaps a motive, and I never measured here, you know, the

distance, but I think it's kind of three miles, maybe, that the officer followed from a dead stop to catch up with someone who is driving the speed limit; in that period of time he was going after this car.

Okay. He says he wasn't. I guess that's why it's important, is because I think of the credibility. He was going after the car.

Now, agreed, *United States v. Whren,* his motivation is not important, and I can't get into the other burden that would make this decision of following the car, whether, in {63} fact, it was racial or profiling. I'm not raising that. I don't have evidence of that. But let's be clear on credibility of the officer. That's what he's doing.

What's the reason? What he does from very early on, he's suspicious of the smell of the air freshener in the car. Overwhelming. That's when his suspicion starts. And he admits that that's when his suspicion starts.

We go through, you know, my memory is several times during cross-examination, but we finally get at the end, yes, that that's suspicious, and that's suspicious for drugs, and that's what he thought was going on.

So you have the suspicious guy who's sitting in the car that certainly looks like, hey, don't look at me, I don't want to be identified. Certainly the actions that common sense dictates. And the smell of the car. Those, to him, smell like drugs.

It's at that point in time, in addition to the traffic stop, I mean as far as he's concerned, and again, what he believes is the traffic stop or not, subjectively, is not important. It's an objective test. He is starting an investigation in this case. He wants[,] my client[,] to go back to the car, and he is suspicious because nobody has ever done that before. Well, okay, nobody has ever done that before. There's nothing in training that says that nobody has done that before; therefore, they are suspicious for having any type of {64} contraband. There's no training that he testified to, at least my memory is, because it's the only time that it's ever happened to him.

Since it's the only time that it's ever happened to him, or one of the very few times, I don't remember, but the very few times, that is not enough to make it overly suspiciously [sic], and overly suspicious of what? I don't want to get in your car if I don't have to. There's a dog in the car, it may not be marked, but you're going to see that there's a dog in the car. I don't want to get in your car. I don't – I'd suggest to the Court that that's not overly suspicious. But the investigation continues.

He is concerned from the very start about the passenger in the car. He runs the Defendant's name through the system to see whether there's any history, whether there's any warrants. I guess I don't remember what he said there was a history – whether he was looking for a history of prior convictions on drugs, that I don't recall specifically. But he's running it. And he's running it to see whether there's any

warrants, which is proper to do. And he does that, and it's at that point in time, Judge, there is no reason that the traffic stop, if he stops him for driving on the road, there's no reason at all that the traffic stop – time for a regular ticket stopped at that point in time. And it's at that point in time, if not earlier, you have an investigation going on. {65} This officer is doing an investigation because he believes that there's drugs involved.

This officer doesn't take the identification of this guy who is looking weird with his actions. He doesn't take the identification for a reason. He goes back, gives him the identification and starts asking him questions, questions that are suspicious. Forgive me, but, you know, driving from Omaha – or from Norfolk to Omaha to buy a car, I don't believe is suspicious. The fact that he's doing it at midnight, he's not doing it at midnight. He doesn't know whether he's doing it. He never asked the question of when he looked at the car or what he did after that. He doesn't know. It's suspicious to him. Nothing more. It is suspicious to him, because I think it's weird; I wouldn't do that.

Everything that he talked about the vehicle and suspicions, there's absolutely nothing suspicious about that at all. Nothing.

But at – let me make sure I get my time right. At 19 minutes after 12 is when the ticket could have been issued and is when he calls for backup. So he is basically –

THE COURT: Well, not necessarily when the ticket has been issued, but that's when he testified he called for backup, 12:19.

MR. O'CONNOR: Yes, sir. My argument and nothing more than that, it's certainly not a fact, is that he could {66} have issued the ticket at that point in time. He did not because he was doing a drug investigation. He was doing a drug investigation so it expanded, extended the period of time for the ticket, traffic stop, into an investigation. He did not have reasonable suspicion to do it at that point in time, period. He extended it for the investigation, a drug investigation, and you cannot do that. At that point in time you cannot do that, unless you have some type of reasonable suspicion. And what he got after 19 minutes after 12 was the inconsistent, what-doesn't-make-sense-to-him actions with the automobile. That's it. Nothing more than that.

So you have these guys that are not free to leave during the traffic stop, that's real obvious. There's no problem with that. But then they're waiting. At some point in time they're taken out of the car where they do the dog search, and these guys are waiting. They are held up. They are detained for whatever period of time, which I don't believe is de minimus [sic] as the law says, hey, it's okay, as long as it's just a short period of time. It's not a short period of time to these guys, not a short period of time when these guys know that they can't leave. That's not a short period of time.

Now, if there is no probable cause, and there's no probable cause if there's no violation of the Nebraska law, and there's no violation of the Nebraska law. Even if it did, even if it got past that, there is no reasonable suspicion to hold {67} these two men for an investigation.

Now, does the law say you can take the dog around anyway? Yeah, it does, because it is search – it's not a search. But these guys are still detained waiting for the dog, waiting for the backup. They are still held a long time before the search – the dog sniffs the car and alerts.

So if there's not reasonable suspicion, then they can't detain them. You can detain them to have the dog for a de minimus [sic] period of time. This is longer than that.

He makes the stop. He's on that road. I mean, you work – live in Omaha, you work in Valley, you're driving back and forth. He's been on that road – He's been on that road long enough to know how far it is. He knows all of those things. He catches – He catches up with these people, catches up with them in this period of time for a reason.

The stop is there. He talks to them. He comes up with every little thing that he can see. He's doing an investigation. And from the start, I submit to you, it is his intent to find some way, some way, to search the car, or at the very least to have the dog go around the car. That was his intent from point one. He's got a dog

in the car, he makes a traffic stop, and that's what he's going to do, and that's what his intent is.

So I tell you there's no probable cause to stop. Even if there was, there's no reasonable suspicion to hold {68} these people, and therefore, the search of the dog is – it's not a search of the dog – these people were detained, and that detention violates their constitutional rights.

THE COURT: Mr. Conboy.

MR. CONBOY: Thank you. And I appreciate Mr. O'Connor keeping this motion clear. There's three points, obviously. There's the traffic stop itself, probable cause for that, there's the duration of the traffic stop, and then there's probable cause for the sniff.

As it relates to the probable cause of the traffic stop, it's clear that the officer had a reasonable objective basis for believing that probable cause existed. He stated in his testimony, and it's uncontested, that he observed the vehicle slowly drift over to the side of the road, at which point the passenger side of the vehicle crossed the lane. This is on Highway 275. And at that point a traffic stop was initiated.

There's been some argument at what point the traffic stop ended. It's been put forth to this Court that the traffic stop itself concluded at 19 minutes after midnight.

To be clear, this is still – the 19 minutes after midnight when Officer Struble called for backup, the

purpose of the traffic stop itself had not been completed. You know, there's been some to-do about what actions Officer Struble took during the traffic stop itself to accomplish the task of the {69} traffic stop, would it have been done more efficiently in another manner, et cetera, et cetera. There's nothing that's been alleged that would violate Mr. Rodriguez's Fourth Amendment rights. And that's the key. There had been no impermissible questions asked of Mr. Rodriguez or Mr. Pollman. There was no unnecessary intention of either of them. And the time for the initial traffic stop from six after midnight to the time it concluded, and not the time that he called for backup. That happened during the purpose of the traffic stop itself. So I don't think that time is relevant. It's just a baseline to show when he called from [sic] him. Other than that, it has no bearing on, really, the motion itself, I don't think.

But when the traffic stop concludes, when Officer Struble gives Mr. Rodriguez his ticket, explains to him the ticket, hands him the ticket, has him sign it, whatever have you, that's when the traffic stop itself concluded. At that point it's not contested that when Mr. – Officer Struble asks Mr. Rodriguez for permission to have his dog run around the car and it's denied, and then Officer Struble requests Mr. Rodriguez to turn off his car and stand by his vehicle. Yeah, he's detained at that point, but that only starts after the traffic stop is concluded. And Officer Struble's testimony is clear, he waited a short period of time for another officer to arrive. He did call for him at 19

minutes, and as I said, that's only there for a baseline to show when he called. But {70} whether or not he has any effect on the length of detention post-traffic stop I think is irrelevant.

It lasted a couple minutes. Officer Struble said that once that officer – backup officer arrived, he then got his dog out, walked it around. That in – I mean, it's clearly a de minimus [sic] detention. The case law in the Eighth Circuit seems to favor that when a K-9 drug dog is already on the scene and the traffic stop is concluded, as long as it happens within a short reasonable period of time after, any dog sniff itself is usually de minimus [sic] detention.

However, I also argue and put forth to this Court that there's also reasonable suspicion. Of course, any one of the factors alone wouldn't amount to reasonable suspicion.

Just because somebody said they came down from Omaha to look at a car after midnight and didn't have a picture of it, maybe that in itself might not seem suspicious, but you add on all the other factors. And I think Officer Morgan did have several things that caught his attention. He noted that there was an overwhelming odor of air fresheners that he testified to that he smelled before he even made contact with the vehicle, walking up to it.

He also noted that Mr. Pollman was overly nervous, had his hat down, wouldn't look at him, looked straight ahead.

Then there was a story about driving down, whether it occurred during the day, whether it occurred at night, I don't {71} know, but the fact is it was after midnight. And the question I asked on redirect was did they just say they had just went to see a vehicle, it was stated it was already asked and answered. I guess the point I was trying to get out was whether or not that's what Officer Struble understood it to be is that they just left Omaha after looking at the vehicle. That's the way I understood the testimony.

Anyway, all of these individual observations themselves, again, probably wouldn't lead a reasonable suspicion to detain them, but together in the totality of the circumstances, I think there was ample reasonable suspicion at that point.

The last point really it doesn't sound like it's contested. Obviously, the testimony was the K-9 itself indicated to the vehicle and alerted, so probable cause itself under Eighth Circuit case law – Supreme Court case law is clear there's probable cause to search the vehicle at that point.

THE COURT: Mr. O'Connor.

MR. O'CONNOR: The traffic stop is ended when the documents are returned. That's when the traffic [stop] is ended. That's not the question. The question is whether it was extended for an investigation. That's the problem and the problem in this case. You don't put anything together and say that there's

reasonable suspicion in this case with these {72} facts. I don't think you even come close.

So the question ultimately is whether they were held long enough to violate their constitutional rights for the dog to do the sniff, which is not a search, but they were held under the circumstances for a long period of time. We're not talking about a couple minutes, we're not talking about that, we're talking about [a] significant period of time. Even if it's five or ten minutes [it] is not de minimus [sic]. And I think if you look at the case law, it will show that.

You have heard many more of these cases than I have tried. You hear the same thing that I hear. The officers, their training on what they do in order to get and look at a car. Their training as to, and they are trained, to give the documents back because you're free to leave, and it's always, oh, by the way, do you mind[,] if you talk to me, you know, all of these things, that's the training. We know what's going on here. I mean, he's got a drug dog, he's out there, he's doing an investigation, he's going to find a way to search that car. It's plain and simple, he's looking for his reasonable suspicion.

It's not this nervous person that's he's concerned about. He can take that identification then. So what does he do when he goes back and talks? My memory is he says you hear different things from people when you start asking them questions during this period of time. That's also training. {73} So what are you doing? You are investigating. And he's been investigating

this thing since he walked up to the car, an extension way past the time for a traffic stop.

Thank you, sir.

THE COURT: Thank you.

Okay. Let me make the following factual findings. Basically, what the testimony is, and really I don't think there's too much difference, really, in argument about when things occurred. Obviously, there's arguments about what they mean and how they affect – why they were done and how they affect the outcome of the case. But generally, I find Struble to be – Officer Struble to be credible as to, certainly, the things that I'm going to recite here. One can take difference with some of these conclusions as to what he's suspicious of and what he's not suspicious of, and I do, as well as Mr. O'Connor, have some doubts about the fact that he has these suspicions but whether they're of any value.

On March 27, 2012, at about 12:06 a.m., the officer's observing westbound lanes of Highway 275 in the area of about 275th Street on Highway 275. And he observes at that time an SUV, a Mercury. It's driving westbound. He then follows the car. I agree with Mr. O'Connor, there does seem to be a little bit of an issue as to why he was – why he testified he did not leave to follow that car, but somehow after observing it he ends up catching up with it. One would have to believe that he {74} would have to do some – have to increase his speed, obviously, more than the car he was overtaking.

At some point in time, though, when he's behind the vehicle, he observes the passenger side tires go over the shoulder. Whether it's called the line – the fog line, you hear it referred to and see and read it referred to in different cases. He makes the stop, and as he's approaching the vehicle – or gets to the vehicle, he smells an overwhelming odor of an air freshener. He approaches the passenger side. He noticed the passenger is nervous, will not make eye contact with him, or at least does not make eye contact with him. He's speaking both to the driver and the passenger from the passenger side, but the passenger's answering the questions.

At some point in time during the exchange he asks the driver, the Defendant in this case, why he made the violation. He's unclear exactly how he phrased that. At first it turns out the driver, Defendant, states that he did not believe he did make the violation, and then later references that there was a large pothole on the roadway. And again, it's not directly tied as to what the question that was asked and what the answer that was given, but sometime there was at least a partial denial, or a denial entirely that he did do the alleged violation of the rules of the road when questioned about the reasons for the stop. I don't really think any of that is {75} really too relevant to the decision as I posture it.

He asked for documents. He requests the Defendant, Mr. Rodriguez, go to his cruiser. The Defendant said he'd rather sit in his own vehicle. At that time he had the – Officer Struble takes the documents

back to his vehicle, runs a records check. Then he comes back up and has an exchange with the passenger, and there's information given about purchase of a vehicle in Omaha and several items about that[,] and the information about the purchase in Omaha make Officer Struble suspicious when added to the other things such as the air freshener. He then later runs the passenger. And after this is all done – we'll do a time line in a moment, but after this is all done, he does a written warning.

He then, after giving the written warning, asks Mr. Rodriguez, who was the drive[r] of the vehicle, the Defendant in this case, if he would mind if the officer walked the K-9 around the vehicle. That's the K-9 Floyd, who was testified to be certified and reliable, and the defense testified he didn't have an argument in this case with the reliability or certifications. The last certification of the dog was on March 21st, just six days before the March 27th stop.

Struble testified the dog is a passive indicator, and the dog alerted and indicated on the second trip around the vehicle.

The Officer Struble then made a request for a backup, {76} who ended up being a Douglas County Sheriff. And the time line that's established by the testimony seems to be this. That the stop itself or the sighting was around 12:06. The stop 12:06. Then at 12:19, there was a call for the assistance of a second officer. The written warning is given to the Defendant at 12:25, which is a total of 19 minutes from beginning

to end. And then Officer Struble testifies that the indication – that the dog was deployed about a minute after the arrival of the Douglas County Sheriff, which was – the deputy, which was at 12:33. And Struble also testifies that the indication by Floyd, the K-9, occurred at about seven to eight minutes after the warning ticket was given. So that's the time line that's basically involved here.

The Defendant, through counsel, draws a distinction to when he believes the actual traffic stop could have ended, specifically that being 12:19, at the time then [sic] he was finished with – he, being Struble, was finished with the drive[r], but then went up to talk with the passenger of the vehicle. I'll note that for the record.

Basically, what's been set out on the record is the analysis of the case. It set out the stop, duration of the stop, and the probable cause for the sniff. An officer has probable cause to conduct a traffic stop if he observes even a minor traffic violation. And an officer's subjective intentions for conducting a traffic stop play no role in {77} ordinary probable cause Fourth Amendment analysis. As long as the officer objectively has a reasonable basis for believing that the driver has breached a traffic law, the officer has probable cause to conduct a traffic stop. *United States v. Thompson,* 93 F.3d 479 (8th Cir. 1996).

In determining the question of whether or not the defendant actually violated a motor vehicle code, but whether objectively reasonable officers could have

formed a reasonable suspicion that the defendant was committing a code violation, that's the issue. While an officer has an obligation to understand the law, the court does not expect the officer to interpret traffic laws with [the] subtlety and expertise of criminal defense lawyers. *United States v. Martin,* 411 F.3d 1998 (8th Cir. 2005). Quoting *United States v. Sanders,* 196 F.3rd 910 (8th Cir. 1999), a determination of objective reasonableness is not made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time.

And I think that is really the definitive question here and not so much the case law mentioned, which was properly cited by Mr. O'Connor. My problem with that case law is, and I understand the conclusions by the judges that are involved, but the reality of it is that I think it parses something that doesn't need to be parsed. First of all, if I were looking at the case from a – as a trial judge in trying the alleged violation, I don't think the Government has to establish {78} driving as if it were another lane of traffic. I don't think that's the intent in that statute, and I don't think it's what the statute says on its face. But I also don't think that that's the issue here.

The issue here is whether Officer Struble, in fact, had an objectively reasonable suspicion that there was a code violation. And I find based upon the testimony today that he did.

Then we get to the length of duration of the stop, and then we have that issue as to how we deal with

the length of duration of [the] stop. And here I've set the time line out, and I'm unwilling to conclude that the officer should have, at 12:19, concluded the traffic stop, or that it did, in fact, as a matter of law conclude for purposes of calculation of the time to 12:19. I note that he did conclude it later at 12:25, which was 19 minutes into the stop, which I do not find to be an inordinately large amount of time. And I also note that within – that the indication of the dog occurred seven to eight minutes after the warning ticket was issued.

The Defendant does not contest the issue of the exterior search by the dog. The exterior sniff is not a Fourth Amendment search. I do disagree with the Government as to probable cause. I do not think Officer Struble had anything other than a rather large hunch. There's no probable cause here, in my opinion, to search this vehicle, absent the {79} information given by the dog.

Now, an exterior dog sniff is not a Fourth Amendment search, according to the United States Supreme Court, and it does not require consent of the person who's the subject of the search.

Let's talk first about the scope of the traffic stop. There's nothing in this case that leads me to believe that the scope of the traffic stop, based upon the time line, was violated. That the law enforcement officer may also run computer checks to determine whether the car is stolen, to run checks to determine if other occupants of the car have outstanding warrants and

to ascertain whether the driver's license itself of the Defendant in this case was valid. *United States v. White,* 81 F.3d 775 (8th Cir. 1996).

As to the deployment of the dog, I find that it was done on a reasonable basis, and that is not a search under the Fourth Amendment. I also find that the deployment of the dog, as I calculated the length of the deployment, to be under ten minutes, and there are specific cases dealing with deployment of the dog, and the violation and when and when not [sic] it is not de minimus [sic]. *United States v. $404,905 in U.S. [C]urrency,* which is, I believe, a Nebraska, our district, case, 182 F.3d 643 (8th Cir. 1999). The court held that a two minute delay to conduct a K-9 sniff with a de minimus [sic] – it was a de minimus [sic] intrusion on the traveler's personal liberty.

{80} In *United States v. Morgan,* 270 F.3d 625, the Eighth Circuit in 2001 extended that time to under ten minutes between the end of the traffic stop and the dog indicating on the vehicle. The court reiterated the position in *United States v. Alexander,* 448 F.3d 1014 (8th Cir. 2006), where it states at most the defendant's detention was extended some four minutes from the point of time which he was notified he would be receiving a warning ticket to the point at which the dog sniff was complete. Even if the lawful[ly] initiated traffic stop terminated at the point at which the trooper told Alexander that he would be receiving a warning ticket, the decision in *$404,905* and *Martin* compels the conclusion that the subsequent[ly] conducted dog sniff was a de minimus [sic]

intrusion on the defendant's Fourth Amendment rights.

Here I find that the time is less than actually – from that time is less than ten minutes and would be included within the case law.

As an aside, Mr. O'Connor, I share a lot of your frustration in cases like this. I share the frustration that the dog search is not a search, which I'm of personal belief that it is. I share the belief that the intrusion of someone who is finished with a traffic stop can have, under Eighth Circuit law, up to ten minutes as de minimus [sic]. But I can read the law, and I have to apply it as read, not as I wished I could have written it. Because I don't think ten minutes is de {81} minimus [sic]. And I certainly don't think that 15 is de minimus [sic] if you want to look at the other numbers that you proposed. But I'm not adopting those numbers in making my conclusion.

In sum it's the following. Struble is credible on the issues that really make a difference. Like I say, I question some of his suspicions, but I'm not a police officer. But I don't think that makes any difference, because I don't think there was anything near probable cause for a search of the vehicle, absent the dog's alert. And I do not believe that the dog's deployment requires anything. I believe that the dog can be deployed, based upon current law, at any traffic stop at any time.

So the stop I find probable cause that there is belief that a minor infraction of the motor vehicle

laws was occurring. That the length of detention is not constitutionally infirmed. That there was not probable cause to search without the dog. That the dog's deployment, that the delay is de minimus [sic] in nature based upon Eighth Circuit rulings.

So based upon that, I will recommend to Judge Bataillon that the motion to suppress, which is number 23, be denied, and that pursuant to Nebraska Criminal Rule 59.2, the Defendant may object to – or anyone who is aggrieved by any part of it, because part of this is not pleasing, I'm sure, to the Government – may object to my recommendation by filing a {82} statement of objections to the magistrate judge's recommendation within 14 days of the filing of the unredacted, and I emphasize unredacted, transcript.

Having so noted, Mr. O'Connor, is there anything else I could [do] for you or Mr. Rodriguez this afternoon?

MR. O'CONNOR: Yeah, Judge. I wonder whether findings – or I think findings are necessary, the probable cause issue has been real clear, whether there was reasonable suspicion to even detain the Defendants based upon this evidence. So I think you need to address –

THE COURT: Yeah, I don't think there was.

MR. O'CONNOR: Okay.

THE COURT: But I don't think it – It has no impact on my ruling.

MR. O'CONNOR: Yeah, the findings is all I wanted –

THE COURT: Exactly, but I'll make that finding, because I don't think it's there. I think it's just a lot of things and a big hunch.

Anything else, Mr. O'Connor?

MR. O'CONNOR: No, sir. Thank you.

THE COURT: Mr. Conboy?

MR. CONBOY: No.

THE COURT: We're in recess. Thank you.

(12:06 – END OF HEARING)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA Plaintiff, v. DENNYS RODRIGUEZ, Defendant.	)	Case No. 8:12CR170 **FINDINGS AND RECOMMENDATION AND ORDER**

At the conclusion of the hearing on July 10, 2012, on defendant's Motion to Suppress (#23), I stated my conclusions on the record and my decision to recommend that the motion to suppress be denied. In accordance with that announcement,

IT IS RECOMMENDED to the Honorable Joseph F. Bataillon, United States District Judge, that the Motion to Suppress (#23) be denied in all respects.

FURTHER, IT IS ORDERED:

1. The clerk shall cause a transcript of the hearing to be prepared and filed.

2. Pursuant to NECrimR 59.2, any objection to the magistrate's Findings and Recommendation shall be filed with the Clerk of the Court within fourteen (14) days after the unredacted transcript is available to counsel. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such

objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

Dated this 10th day of July 2012.

BY THE COURT:

s/ F.A. Gossett, III
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA Plaintiff, v. DENNYS RODRIGUEZ, Defendant.	)	CASE NO. 8:12CR170 **DEFENDANT'S STATEMENT OF OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION** (Filed Aug. 17, 2012)

The Defendant, Dennys Rodriguez, by and through his attorney, Shannon P. O'Connor, hereby submits his Statement of Objections to the Magistrate Judge's Findings and Recommendation. In support of this statement of objections, the Defendant states as follows:

1. The Defendant objects to the Magistrate Judge's conclusion on pages 78 and 81 that Struble had an objectively reasonable basis for making the traffic stop.

2. The Defendant objects to the Magistrate Judge's factual finding on page 78 that the indication of the dog occurred seven to eight minutes after the warning ticket was issued.

3. The Defendant objects to the Magistrate Judge's conclusion on pages 79-81 that the detention of Rodriguez following the traffic stop was a *de minimis* intrusion on his Fourth Amendment rights.

4. The Defendant objects to the Magistrate Judge's recommendation on page 81 that his Motion to Suppress be denied.

5. Accompanying this Statement of Objections is a brief in support hereof.

WHEREFORE, the Defendant respectfully requests that the Court sustain the Defendant's objections to the Magistrate's Findings and Recommendation and grant the Defendant's Motion to Suppress.

Respectfully submitted,

DENNYS RODRIGUEZ, Defendant,

By: s/ Shannon P. O'Connor

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. DENNYS RODRIGUEZ, Defendants [sic].	8:12CR170 **MEMORANDUM AND ORDER**

This matter is before the court on defendant's objections, Filing No. 40, to the findings and recommendations ("F&R"), Filing Nos. 34 and 37, denying defendant's motion to suppress, Filing No. 23. The magistrate judge recommended that the defendant's motion to suppress be denied. Pursuant to 28 U.S.C. § 636(b)(1)(A), the court has conducted a de novo determination of those portions of the F&R to which the defendant objects. *United States v. Lothridge*, 324 F. 3d 599, 600-01 (8th Cir. 2003). The court has reviewed of [sic] the entire record including the transcript of the suppression hearing.

BACKGROUND

The court will briefly summarize the facts. The parties dispute very little with regard to the facts.

Officer Morgan Struble[1] testified that he was in the median on Highway 275. The defendant passed him going westbound in the opposite direction. Officer Struble turned his vehicle onto Highway 275 and headed in the same direction as the defendant. The time was approximately midnight. Officer Struble saw defendant's car briefly veer off the highway onto the shoulder of the road and then return back to the road. Officer Struble then pulled defendant over. As Officer Struble approached the vehicle, he smelled air fresheners. As defendant rolled down the window he smelled more of the same odor. He approached the passenger side of the car, and the passenger seemed nervous and would not make eye contact with him. The defendant was asked why he ran off the road. At some point defendant may have indicated he did not run off the road; however, he then stated to Officer Struble that there was a large pothole on the road. Officer Struble asked the defendant to come to his police vehicle, but the defendant declined. The officer then ran a records check. Officer Struble asked the defendant and passenger about the purpose of their trip, and there was a discussion regarding a possible purchase of a car in Omaha. Officer Struble did not find that credible, given the time of evening. Officer Struble then issued a warning ticket and asked if defendant would mind if K-9 Floyd walked around the vehicle. The defendant answered in the negative.

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[1] Magistrate Judge F.A. Gossett found Officer Struble's testimony credible.

Officer Struble then asked defendant to exit his vehicle, to turn it off, and to stand in front of the cruiser till [sic] the second officer arrived. Officer Struble equested backup and another officer arrived. K-9 Floyd alerted and indicated. The sequence of timing took about 19 minutes from the initial stop to issuance of the warning ticket. It took the backup officer another four minutes to arrive. The dog alerted within 10 minutes or less after the completion of the stop and issuance of the ticket. The car was searched at some point thereafter. During the search a large bag of methamphetamine was discovered.

DISCUSSION

The magistrate judge found probable cause for the initial traffic stop, reasoning the officer had a reasonable basis for believing a violation had occurred. *See United States v. Thomas,* 93 F.3d 479 (8th Cir. 1996). Defendant argues that it is not in fact a violation to briefly run off the side of the road onto the shoulder. A traffic stop must be based on an officer's reasonable belief that a traffic violation has occurred. *United States v. Washington,* 455 F.3d 824, 826 (8th Cir. 2006). The magistrate judge found the defendant's argument lacked merit because Officer Struble had an objectively reasonable suspicion that a code violation occurred. The court has carefully reviewed the findings of the magistrate judge and affirms the

same.[2] The stop was objectively reasonable under the circumstances, as the officer had probable cause to believe that a traffic violation had occurred.

Defendant next argues that the use of the K-9 for a search and also the duration of the traffic stop are both unlawful. The magistrate judge determined that the deployment of the dog was reasonable and not a search under the Fourth Amendment. The magistrate judge further found that Officer Struble did not need defendant's consent for the search. Likewise, this court agrees with the magistrate judge that the dog search was constitutional, based on the facts as set forth in the transcript and as summarized herein.

As for the timing of the traffic stop, the magistrate judge concluded that it was lawful. "A lawful

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[2] The defendant relies on this court's decision in *United States v. Magallanes*, 730 F. Supp.2d 969, 977 (D. Neb. 2010) where this court found that [] "Neb. Rev. Stat. § 60-6,142 was not meant to 'criminalize an inadvertent momentary crossing onto the shoulder . . . as a pretext to stop otherwise suspicious vehicles.'" *Id.* at 977, *quoting Graumann*, 2010 U.S. Dist. LEXIS 79273 at *5-6. The court notes that a recent unpublished opinion in Nebraska found otherwise. *See State v. Medina*, 2011 WL 2577268 (Neb. App. 2011). The Court of Appeals addressed this exact issue and determined that Neb. Rev. Stat. § 60-6,142 included driving off of the highway and onto the shoulder and then back onto the highway, rejecting the thoroughfare analysis, and thus disagreeing with the *Magallanes* case. *See id.* at *5. Although *Medina* is not dispositive of Nebraska law, this court will adopt its reasoning. *See also United States v. Coleman*, 2011 WL 2182180 (D. Neb. 2011) (Magistrate Judge Cheryl Zwart has likewise determined that a momentary crossing onto the shoulder violates § 60-6,142.)

traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop." *United States v. Hernandez-Mendoza,* 600 F.3d 971, 975 (8th Cir. 2010) (internal quotation and citation omitted). The magistrate judge found that the timing was de minimis, citing *United States v. $404,905 in U.S. Currency,* 182 F.3d 643 (8th Cir. 1999). *See also United States v. Morgan,* 270 F.3d 625 (8th Cir. 2001) (under 10 minutes de minimis). Officer Struble requested backup for officer safety. The backup officer responded in a short period of time. Officer Struble had his K-9 in his car and conducted the search immediately thereafter.

"[D]og sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." *United States v. Alexander,* 448 F.3d 1014, 1016 (8th Cir. 2006). The magistrate judge found, and this court agrees, that the total elapsed time is similar to the times found constitutional by the Eighth Circuit. The magistrate judge concluded that the initial stop of 19 minutes, plus the 7 to 10 minutes for the dog to alert thereafter, was not of constitutional significance. The court agrees with the findings of fact and conclusions of law in this regard. Accordingly, the court will adopt the F&R of the magistrate judge in this regard.

THEREFORE, IT IS ORDERED:

1. The defendant's motion to suppress, Filing No. 23, is denied;

2. The defendant's objections to the F&R, Filing No. 40, are overruled; and

3. The F&R of the magistrate judge, Filing Nos. 34 and 37, is adopted in its entirety.

Dated this 30th day of August, 2012.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA	**Case Number: 8:12CR170-001**
Plaintiff	**USM Number: 24881-047**
v.	
DENNYS RODRIGUEZ	**SHANNON P. O'CONNOR**
Defendant	**Defendant's Attorney**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT pleaded guilty to count I of the Indictment on September 28, 2012.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title, Section & Nature of Offense	Date Offense Concluded	Count Number
21:841(a)(1) and 21:841(b)(1) – POSSESSION WITH INTENT TO DISTRIBUTE 50 GRAMS OR MORE METH-AMPHETAMINE MIX	March 27, 2012	I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Following the imposition of sentence, the Court advised the defendant of the right to appeal pursuant to the provisions of Fed. R. Crim. P. 32 and the provisions of 18 U.S.C. § 3742(a) and that such Notice of Appeal must be filed with the Clerk of this Court within fourteen (14) days of this date pursuant to Fed. R. App. P. 4.

The defendant shall cooperate in the collection of DNA, pursuant to Public Law 108-405 (Revised DNA Collection Requirements under the Justice for All Act of 2004).

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
January 4, 2013

s/ Joseph F. Bataillon
United States District Judge

January 4, 2013

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **sixty (60) months**.

The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant participate in the 500-hour Comprehensive Drug Treatment Program or any similar drug treatment program available.

2. That the defendant be incarcerated in a federal facility as close to **Norfolk, NE** as possible, the court suggests FPC Yankton, SD.

3. Defendant should be given credit for time served.

(X) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of this judgment this ___ day of ___, ___

_____
Signature of Defendant

RETURN

It is hereby acknowledged that the defendant was delivered on the ___ day of ___, ___ to _____, with a certified copy of this judgment.

_____
UNITED STATES WARDEN

By: _____

NOTE: The following certificate must also be completed if the defendant has not signed the Acknowledgment of Receipt, above.

CERTIFICATE

It is hereby certified that a copy of this judgment was served upon the defendant this ___ day of _____, ___

_____
UNITED STATES WARDEN

By: _____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **four (4) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days

of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of DNA as directed by the probation officer, pursuant to the Public Law 108-405 (Revised DNA Collection Requirements Under the Justice for All Act of 2004), if such sample was not collected during imprisonment.

2. Paragraph # 7 of the Standard Conditions of supervision is modified, i.e., instead of merely refraining from excessive use of alcohol, the defendant shall not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.

3. The defendant shall submit his or her person, residence, office, or vehicle to a search conducted by a United States Probation Officer at any time; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

4. The defendant shall attend, pay for and successfully complete any diagnostic evaluations, treatment or counseling programs, or approved support groups (e.g., AA/NA) for alcohol and/or controlled substance abuse, as directed by the probation officer.

5. It is recommended that the defendant complete his GED while incarcerated or during his term of supervised release, or in the alternative, complete an approved vocational rehabilitation program as directed by the probation officer.

6. The defendant shall provide the probation officer with access to any requested financial information.

7. The defendant shall attend, successfully complete, and pay for an approved cognitive-behavioral based program as directed by the probation officer.

8. Pursuant to 18 U.S.C. § 3583(d), the defendant shall submit to a drug test within fifteen (15) days of release on supervised release and at least two (2) periodic drug tests thereafter to determine whether the defendant is using a controlled substance. Further, the defendant shall submit to such testing as requested by any probation officer to detect the presence of alcohol or controlled substances in the defendant's body fluids and to determine whether the defendant has used any of those substances. Based on the defendant's ability to pay, the defendant shall pay for the collection of urine samples to be tested for the presence of alcohol and/or controlled substances in an amount to be determined by the probation officer.

9. The defendant shall report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 111 South 18th Plaza, Suite C79, Omaha, Nebraska, (402) 661-7555, within seventy-two (72) hours of release from confinement, and, thereafter, as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$100.00		

The Court has determined that the defendant does not have the ability to pay interest and it is ordered that:

(X) The interest requirement is waived.

FINE

No fine imposed.

RESTITUTION

No restitution was ordered.

SCHEDULE OF PAYMENTS

The defendant shall pay the special assessment in the amount of $100.00 immediately.

The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States of America may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

Without limiting the foregoing, and during the defendant's term of incarceration, the defendant shall participate in the Bureau of Prisons' Financial Inmate Responsibility Program. Using such Program, the defendant shall pay 50% of the available inmate institutional funds per quarter towards the criminal monetary penalty.

Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of $100 or 3% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

SCHEDULE OF PAYMENTS – CONTINUED

Any payments made on the outstanding criminal monetary penalty shall be applied in the following order of priority: special assessment; restitution; fine; and other penalties. Unless otherwise specifically ordered, all criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to the clerk of the Court. Unless otherwise specifically ordered, interest shall not accrue on the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of Court for the District of Nebraska, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall inform the probation officer of any change in his or her economic circumstances affecting the ability to make monthly installments, or increase the monthly payment amount, as ordered by the court.

The defendant is restrained from transferring any real or personal property, unless it is necessary to liquidate and apply the proceeds of such property as full or partial payment of the criminal monetary penalty.

CLERK'S OFFICE USE ONLY:

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I hereby attest and certify this
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Court for the District of Nebraska.
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By _____ Deputy Clerk

United States Court of Appeals
for the Eighth Circuit

No. 13-1176

United States of America

Plaintiff - Appellee

v.

Dennys Rodriguez

Defe lant - Appellant

Appeal from United States District Court
for the District of Nebraska – Omaha

Submitted: November 21, 2013
Filed: January 31, 2014

Before WOLLMAN, COLLOTON, and GRUENDER, Circuit Judges.

WOLLMAN, Circuit Judge.

Dennys Rodriguez entered a conditional guilty plea to one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1).

Rodriguez appeals from the district court's[1] order denying his motion to suppress evidence. We affirm.

On March 27, 2012, just after midnight, police officer Morgan Struble observed a vehicle veer slowly onto the shoulder of the highway, before it jerked back onto the road. Struble initiated a traffic stop of the vehicle at 12:06 a.m. Struble is a K-9 officer, and his dog Floyd was with him that night.

Struble approached the vehicle on the passenger's side. The driver identified himself as Rodriguez. When asked why he drove onto the shoulder, Rodriguez replied that he had swerved to avoid a pothole. The passenger, who would not make eye contact with Struble, identified himself as Scott Pollman. Struble gathered Rodriguez's license, registration, and proof of insurance and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble said that he was not. Rodriguez then decided to wait in his own vehicle.

Struble went to his patrol car to complete a records check on Rodriguez. When he returned to Rodriguez's vehicle, Struble asked Pollman for his identification and inquired where Pollman and Rodriguez had been. Pollman explained that they had traveled to Omaha, Nebraska, to look at a Ford

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[1] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, adopting the Findings and Recommendation of the Honorable F.A. Gossett, III, United States Magistrate Judge for the District of Nebraska.

Mustang that was for sale and that they were returning to Norfolk, Nebraska. When Struble went to his patrol car for a second time, he completed a records check on Pollman and called for a second officer. Struble issued a written warning to Rodriguez at 12:27 or 12:28 a.m.

Struble then asked for permission to walk his dog around Rodriguez's vehicle. When Rodriguez refused consent, Struble instructed him to exit the vehicle. Rodriguez then exited the vehicle and stood in front of the patrol car while they waited for a second officer to arrive. At 12:33 a.m., a deputy sheriff arrived, and a minute later, Struble walked the dog around the outside of Rodriguez's car. The dog alerted to the presence of drugs halfway through the second pass, approximately twenty or thirty seconds later. All told, seven or eight minutes had passed from the time Struble had issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

As set forth above, Rodriguez was charged with possessing with intent to distribute methamphetamine. The district court denied Rodriguez's motion to suppress the evidence, holding that the delay caused by the dog sniff did not violate Rodriguez's Fourth Amendment right to be free from unreasonable seizures. On appeal, Rodriguez argues that his motion should have been granted because the stop was unreasonably prolonged by the dog sniff in the absence of reasonable suspicion to continue his

detention. Rodriguez does not challenge the validity of the initial stop.

"[A] dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in privacy." *United States v. Martin,* 411 F.3d 998, 1002 (8th Cir. 2005) (quoting *Illinois v. Caballes,* 543 U.S. 405, 408 (2005)). We have held that once an "officer decides to let a routine traffic offender depart with a ticket, a warning, or an all clear[,] . . . the Fourth Amendment applies to limit any subsequent detention or search." *United States v. $404,905.00 in U.S. Currency,* 182 F.3d 643, 648 (8th Cir. 1999). Accordingly, a dog sniff may be the product of an unconstitutional seizure, "if the traffic stop is unreasonably prolonged before the dog is employed." *Martin,* 411 F.3d at 1002 (citing *Caballes,* 543 U.S. at 407). A brief delay to employ a dog does not unreasonably prolong the stop, however, and we have repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded. *See, e.g., United States v. Alexander,* 448 F.3d 1014, 1017 (8th Cir. 2006) (four-minute delay upheld as a *de minimis* intrusion on personal liberty); *Martin,* 411 F.3d at 1002 (two-minute delay upheld); *United States v. Morgan,* 270 F.3d 625, 632 (8th Cir. 2001) (delay of "well under ten minutes" upheld); *$404,905.00 in U.S. Currency,* 182 F.3d at 649 (two-minute delay upheld).

Although the dog was located in the patrol car, Struble waited to employ it until a second officer

arrived, explaining that he did so for his safety because there were two persons in Rodriguez's vehicle. The resulting seven- or eight-minute delay is similar to the delay that we have found to be reasonable in other circumstances. *See Morgan,* 270 F.3d at 632 ("We do not believe that the few minutes difference between the time in this case and *$404,905* has constitutional significance."). We thus conclude that it constituted a *de minimis* intrusion on Rodriguez's personal liberty.

In light of our conclusion that the traffic stop was not unreasonably prolonged, we need not decide whether Struble had reasonable suspicion to continue Rodriguez's detention. The order denying the motion to suppress is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-1176

United States of America

Plaintiff - Appellee

v.

Dennys Rodriguez

Defendant - Appellant

Appeal from U.S. District Court for the
District of Nebraska – Omaha
(8:12-cr-00170-JFB-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 31, 2014

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

PETITIONER'S BRIEF

No. 13-9972

IN THE

Supreme Court of the United States

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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November 17, 2014

QUESTION PRESENTED

After a law enforcement officer has completed a stop for a traffic infraction, does the continued detention of the driver to conduct a dog sniff, without probable cause or reasonable suspicion to believe that the vehicle contains contraband, violate the Fourth Amendment's prohibition against unreasonable seizures?

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OPINIONS BELOW

The relevant decision of the United States Court of Appeals for the Eighth Circuit, J.A. 127-31, is *United States* v. *Rodriguez*, 741 F.3d 905 (8th Cir.), *cert. granted*, 135 S. Ct. 43 (Oct. 2, 2014) (No. 13-9972). The District Court's relevant opinion, its Memorandum and Order denying Mr. Rodriguez's Motion to Suppress, J.A. 110-15, is unpublished. *United States* v. *Rodriguez*, No. 8:12-CR-170, 2012 WL 5458427 (D. Neb. Aug. 30, 2012). The United States Magistrate Judge issued Findings and Recommendations from the bench. J.A. 95-104. The Magistrate Judge's subsequent Findings and Recommendation and Order is also unpublished. J.A. 106-07.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014. The petition was granted on October 2, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

INTRODUCTION

When Petitioner Dennys Rodriguez was pulled over on a Nebraska highway for momentarily driving on the shoulder of the road, he became one of more than seventeen million people "seized" each year for a traf-

fic violation.[1] Fourth Amendment seizures must be justified at their inception and limited in scope to the circumstances that warranted the intrusion in the first place. But the decision below proposes an exception to these principles for routine traffic stops. Under this exception, an officer who has stopped a driver for a minor traffic infraction may, without additional justification, continue to hold the driver for a "*de minimis*" amount of time after the stop is over based solely on the generalized possibility that the detention may lead to the discovery of contraband.

This Court should reject the "*de minimis*" exception because it authorizes a detention without individualized suspicion—an irreducible component of Fourth Amendment "reasonableness" whenever law enforcement pursues its general interest in crime control. In its place, this Court should recognize a bright-line rule that a traffic stop concludes when the tasks related to the reason for the stop are complete. Any further detention, however brief, is unconstitutional in the absence of individualized suspicion.

STATEMENT OF THE CASE

A. Factual Background

Just after midnight on March 27, 2012, petitioner Dennys Rodriguez and his passenger, Scott Pollman, were driving westward from Omaha, Nebraska, to Norfolk, Nebraska, on Nebraska State Highway 275. J.A. 17-18, 20, 24. About twenty miles into their trip,

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[1] Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008* 7 (Oct. 2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf (reporting on survey conducted by the Department of Justice's Bureau of Justice Statistics about face-to-face contacts between citizens and police).

just outside the small community of Valley, Nebraska, Mr. Rodriguez drove past Officer Morgan Struble of the Valley Police Department. J.A. 35, 39. Officer Struble was positioned in a turnaround median watching for "speeders and intoxicated drivers and so on." J.A. 36. Although Mr. Rodriguez was not speeding or driving erratically, Officer Struble immediately pulled onto the highway and began traveling westbound behind Mr. Rodriguez's Mercury Mountaineer. J.A. 19, 44.

Officer Struble pursued Mr. Rodriguez's vehicle until he was approximately three to four car-lengths behind, with Mr. Rodriguez traveling in the right lane of the four-lane divided highway and Officer Struble staying in the left lane. J.A. 44-45. From this vantage point, Officer Struble saw the passenger-side tires of Mr. Rodriguez's vehicle cross for about two seconds over the line separating the right lane of traffic from the shoulder of the highway. J.A. 46. Mr. Rodriguez then quickly corrected back into his lane of traffic. J.A. 48-49. Officer Struble decided to stop Mr. Rodriguez for driving on the shoulder of the road. J.A. 44. He pulled over Mr. Rodriguez's vehicle at approximately 12:06 a.m. J.A. 26.

As Officer Struble approached Mr. Rodriguez's Mountaineer from the passenger's side, he noticed a strong odor of air freshener. J.A. 20. At the vehicle, he spoke first with Mr. Rodriguez, obtained Mr. Rodriguez's license, registration, and proof of insurance, and asked why he had driven onto the shoulder. J.A. 22, 50. Mr. Rodriguez said he had swerved to avoid a pothole and was agitated when Officer Struble informed him that momentarily crossing onto the shoulder was a traffic violation. *Id.* While Officer Struble was speaking with Mr. Rodriguez from the passenger side of the vehicle, he noticed that the pas-

senger, Mr. Pollman, seemed nervous. J.A. 21. Mr. Pollman pulled his cap low over his eyes, smoked a cigarette, and did not look at Officer Struble. *Id.*

Officer Struble asked Mr. Rodriguez to step out of the vehicle. J.A. 23. Mr. Rodriguez complied and met Officer Struble at the back of the Mountaineer. *Id.* Officer Struble then asked Mr. Rodriguez to accompany him to his patrol car so that the officer could complete some paperwork. *Id.* Mr. Rodriguez asked if he was obligated to do so. *Id.* When Officer Struble said "no," Mr. Rodriguez demurred, saying he would rather just sit in his own vehicle. *Id.* Officer Struble was taken aback by Mr. Rodriguez's response. J.A. 52-54. Although he had never before had anyone refuse to come back to his patrol car, he claimed that, "in [his] experience," doing so was a "subconscious behavior that people concealing contraband will exhibit." J.A. 53.

Officer Struble returned to his cruiser and called in a request for a records check on Mr. Rodriguez. J.A. 23. He then returned to Mr. Rodriguez's vehicle to talk with Mr. Pollman. J.A. 24. Officer Struble asked Mr. Pollman for his identification and then began inquiring about "where he was coming from and where they were going." *Id.* Mr. Pollman explained that he and Mr. Rodriguez had made the two-hour trip from Norfolk to Omaha to investigate the possibility of purchasing an older-model Ford Mustang. J.A. 60-61. They had decided against buying the car when the owner could not produce the title. *Id.* Officer Struble asked whether they had viewed any pictures of the Ford Mustang before driving to Omaha to see the car in person, and Mr. Pollman replied that they had not. J.A. 25.

Officer Struble had specifically noted Mr. Pollman's nervousness during the officer's first exchange with

Mr. Rodriguez at the vehicle. J.A. 21. When he was speaking to Mr. Pollman directly, however, Officer Struble did not testify that he observed any signs of nervousness. Nonetheless, Officer Struble found the plan to purchase the car strange because Officer Struble himself would not have made such a drive without first seeing photos of the vehicle he was thinking about purchasing. J.A. 25-26. He also found their decision to drive from Norfolk to Omaha late on a Tuesday night "abnormal." J.A. 26. It was "common knowledge," he said, that people do not drive a long distance to look at a vehicle and come back at midnight. J.A. 60. But, during the traffic stop, Officer Struble did not ask how long Mr. Pollman and Mr. Rodriguez had been in Omaha, when they had actually looked at the Mustang, or whether they had attended to any other business before or after looking at the car. J.A. 61-63.

After obtaining Mr. Pollman's driver's license, Officer Struble again returned to his cruiser. It was 12:19 a.m.—about thirteen minutes into the traffic stop. J.A. 26-27. Officer Struble had a drug-detection dog in his car, and decided that he was "going to walk [his] dog around the vehicle regardless whether [Mr. Rodriguez] gave [him] permission or not." J.A. 71. However, Officer Struble wanted a second officer to act as a backup because there were two persons involved in the stop. J.A. 71-72. Officer Struble requested a records check on Mr. Pollman's license and then contacted a second officer. Officer Struble then began writing a warning ticket for Mr. Rodriguez. J.A. 26-27.

Officer Struble returned to Mr. Rodriguez's vehicle for a third time, where he returned all of the documents he had collected to Mr. Rodriguez and Mr. Pollman. J.A. 27. Officer Struble then issued a writ-

ten warning to Mr. Rodriguez for driving on the shoulder of the road. J.A. 76. Officer Struble completed the warning at 12:25 a.m. and said he gave it to Mr. Rodriguez no more than a minute or two later. J.A. 27-28.

By the time Officer Struble had returned Mr. Rodriguez's documents and issued the warning, Officer Struble had "[taken] care of all the business" of the traffic stop. J.A. 70. In his words, he had "got[ten] all the reason for the stop out of the way." *Id.* Nevertheless, because of his plan to conduct the sniff regardless of what else happened, Officer Struble did not allow Mr. Rodriguez to leave. Instead, Officer Struble asked Mr. Rodriguez if "he had an issue with [Officer Struble] walking [his] police service dog around the outside of [the] vehicle." J.A. 29, 72-73. When Mr. Rodriguez replied that he did, in fact, have an issue with that, Officer Struble directed Mr. Rodriguez to turn off the ignition, get out of his vehicle, and stand in front of the cruiser until the second officer arrived. J.A. 29-30. Officer Struble acknowledged that at this point Mr. Rodriguez "was not free to leave." J.A. 69-70.

Officer Struble's backup officer, Deputy Duchelus of the Douglas County Sheriff's Office, arrived at 12:33 a.m. J.A. 32, 98. About one minute later, or approximately seven to eight minutes after Officer Struble had issued the warning for driving on the shoulder, Officer Struble walked his dog around Mr. Rodriguez's Mountaineer. The dog alerted. J.A. 32-33. During a search of the vehicle, officers discovered a bag of methamphetamine. J.A. 34. Mr. Rodriguez was later charged with possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1). J.A. 116.

B. Suppression Hearing

Mr. Rodriguez moved to suppress the evidence seized from his car, arguing that Officer Struble had violated his Fourth Amendment rights by detaining him for a dog sniff without reasonable suspicion of criminal activity. J.A. 12-13.

After hearing evidence, the United States Magistrate Judge recommended that the motion be denied. J.A. 103. The Magistrate Judge acknowledged that the sniff occurred about eight minutes *after* the traffic stop had concluded. J.A. 98. He also agreed that Officer Struble had nothing but a "big hunch" that Mr. Rodriguez was hiding something in the vehicle and no reasonable suspicion to independently support the detention. J.A. 103-04. Nonetheless, the Magistrate Judge recommended that the district court deny Mr. Rodriguez's motion. The Magistrate Judge believed that Eighth Circuit precedent he was bound to apply would consider the delay an acceptable "de minimus [sic] intrusion on the defendant's Fourth Amendment rights." J.A. 101-02. The Magistrate Judge cited *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), to support his conclusion. J.A. 101. There, the Eighth Circuit held that, "when a police officer makes a traffic stop and has at his immediate disposal the canine resources to employ [what is a] uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior." *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (footnote omitted).

The Magistrate Judge asserted that, under this "*de minimis*" rule, the Eighth Circuit allows for up to ten minutes of suspicionless detention for officers to accomplish a dog sniff. J.A. 101. Because the detention

in Mr. Rodriguez's case was less than ten minutes, the Magistrate Judge recommended denying his motion to suppress. J.A. 102-03.

The district court adopted the Magistrate Judge's factual findings and legal conclusions in their entirety. J.A. 115.

Mr. Rodriguez entered a conditional guilty plea to the Indictment, reserving his right to appeal the denial of his motion to suppress. He was sentenced to the mandatory minimum sentence of five years in prison.

C. Appellate Proceedings

The Eighth Circuit affirmed. It began with the proposition that a dog sniff conducted in a reasonable manner during a lawful traffic stop "'does not infringe upon a constitutionally protected interest in privacy.'" J.A. 130 (quoting *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting *Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005))). A canine sniff "may be the product of an unconstitutional seizure," however, "'if the traffic stop is unreasonably prolonged before the dog is employed.'" *Id.* (quoting *Martin*, 411 F.3d at 1002). The Eighth Circuit held that this was not the case in the Rodriguez stop. "A brief delay to employ a dog does not unreasonably prolong the stop," the Court of Appeals asserted. *Id.* In fact, the Eighth Circuit had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded." *Id.* (citing *United States* v. *Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006); *Martin*, 411 F.3d at 1002; *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001); and *$404,905.00 in U.S. Currency*, 182 F.3d at 649). The Court of Appeals surveyed detentions it had upheld under this rule, noting that they ranged from two minutes to close to ten minutes. *Id.* The

seven- or eight-minute delay in Mr. Rodriguez's case fell within these limits. J.A. 131. The court therefore held that Mr. Rodriguez's detention was "a *de minimis* intrusion on [Mr.] Rodriguez's personal liberty" and not an unreasonable seizure. *Id.* In light of this conclusion, the Court of Appeals expressly declined to decide whether Officer Struble had reasonable suspicion to continue Mr. Rodriguez's detention. *Id.* Thus, the "*de minimis*" exception was the sole basis for the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

When an officer stops a motorist for a traffic violation, she initiates a "seizure" under the Fourth Amendment. But the seizure is a limited one. A traffic stop must be brief and reasonably related in scope to the circumstances that justified the detention in the first place. Because addressing the traffic violation is the "purpose" of the stop, the stop may last no longer than necessary to effectuate that purpose.

An officer may employ a drug dog during a traffic stop provided the sniff does not delay completion of the tasks related to the traffic infraction. However, the officer may not expand the boundaries of a traffic stop to accomplish the sniff. Once the acts related to the traffic violation have been completed, the driver must be allowed to be on his way unless the facts support reasonable suspicion of criminal activity. Individualized suspicion is required whenever law enforcement wishes to detain someone to investigate ordinary criminal wrongdoing.

These well-settled Fourth Amendment principles establish a bright-line rule: a traffic stop ends after an officer has completed the acts related to the traffic violation, and any detention beyond that point, no

matter how brief, is unreasonable unless independently justified by individualized suspicion.

The Eighth Circuit's justification for a "*de minimis*" exception to these clearly defined boundaries is flawed in several respects. First, the Eighth Circuit wrongly assumes that the line marking the end of a traffic stop is "artificial" and that a standard of overall reasonableness should allow a dog sniff that could have occurred within the scope of the traffic stop to take place a short time afterwards. But a line established by the Constitution is not "artificial." Moreover, any other line would leave the end of a traffic stop entirely in the hands of the police, thereby violating the Fourth Amendment's fundamental purpose of limiting officer discretion. It may be true that honoring the Constitution's line will mean that some officers will not be able to conduct a dog sniff. But the desire of police to employ a popular tool for a separate, unsupported investigation does not trump the constitutional rights of the person who has been seized. It is certainly no reason to institute a standardless "*de minimis*" exception in the name of overall reasonableness. When, as here, an exception threatens to swallow the general rule, a bright-line standard for reasonableness is not only preferred, it is necessary.

Second, a detention for a dog sniff after a traffic stop ends is not comparable, in context or intrusiveness, to the practice of ordering a driver out of his vehicle during a traffic stop. A traffic stop anchored by probable cause is a far different context than a post-stop detention initiated without any cause at all. And detaining an individual for the frightening and error-prone practice of a dog sniff is a far greater intrusion than requiring a driver to get out of his car.

Third, contrary to the Eighth Circuit's assertion, the fact that a dog sniff is not a "search" under the Fourth Amendment does not justify a suspicionless detention to enable it. It is the seizure itself, not the dog sniff conducted within the seizure, that makes a post-stop canine sniff unconstitutional.

A bright-line rule provides needed guidance to officers in the field as they conduct millions of traffic stops each year. It protects innocent motorists from suspicionless intrusions while leaving law enforcement ample opportunity to conduct dog sniffs when they have individualized suspicion or, as is often the case, consent. The Court should adopt this bright-line rule.

Under this bright-line rule, this Court should reverse the decision below. When Officer Struble detained Mr. Rodriguez after completing the traffic investigation, he had no objectively reasonable basis for suspecting that Mr. Rodriguez was involved in criminal activity. The facts that Officer Struble considered suspicious are consistent with innocent travel and easily explained by the circumstances of the stop. Because the post-stop seizure was not justified by reasonable suspicion, Mr. Rodriguez's detention violated the Fourth Amendment.

ARGUMENT

I. AFTER AN OFFICER HAS COMPLETED THE INVESTIGATION INTO A MOTORIST'S TRAFFIC VIOLATION, CONTINUED DETENTION OF THE MOTORIST WITHOUT INDIVIDUALIZED SUSPICION OF CRIMINAL ACTIVITY VIOLATES THE FOURTH AMENDMENT.

Stopping an automobile for a traffic violation constitutes a "seizure" under the Fourth Amendment. *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979). The extent of the seizure, however, is not that of a full-blown arrest. *Knowles* v. *Iowa*, 525 U.S. 113, 117 (1998). Instead, a traffic stop is analogous to a *Terry* stop. *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968)); see also *Arizona* v. *Johnson*, 555 U.S. 323, 330 (2009).

Consistent with *Terry*, a traffic stop must be justified at its inception and limited in duration and scope. *Florida* v. *Royer*, 460 U.S. 491, 500 (1983); see also *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985). The officer's investigation must be brief and carefully tailored to the reason the driver was stopped in the first place. *Knowles*, 525 U.S. at 117-18; *Royer*, 460 U.S. at 500. When justified "solely by the interest in issuing a warning ticket to the driver," the stop may not be "prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U.S. at 407. If an officer is able to conduct a canine sniff within this time frame, she may do so without independent justification. *Id.* at 407-08 (upholding a sniff that a second officer conducted while the officer who made the stop was writing out a warning ticket). According to *Caballes*, however, the officer may not extend the stop or unlawfully detain the driver to walk her dog around the vehicle. *Id.* at 408.

When the tasks related to the purpose of the traffic stop have been completed, the authority to hold the occupants of the vehicle also comes to an end. *Id.* at 407. After that time, a motorist is in the same legal position as a citizen walking on a public sidewalk or waiting for a flight at an airport. An officer may not detain that person, even momentarily, without individualized suspicion of criminal activity. *Terry*, 392 U.S. at 21-23; *Royer*, 460 U.S. at 498.

"A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of criminal wrongdoing." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000); *Chandler* v. *Miller*, 520 U.S. 305, 308 (1997). Because the requirement of individualized suspicion was a direct response to the use of "'general warrants'" that the Framers "despised," this Court has recognized only limited circumstances in which that requirement does not apply. *Maryland* v. *King*, 133 S. Ct. 1958, 1980-81 (2013) (Scalia, J., dissenting); *Chandler*, 520 U.S. at 308. These circumstances include detentions of persons present during the execution of search warrants, border and sobriety checkpoints, and administrative and safety inspections. *Edmond*, 531 U.S. at 37; see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 549-50 (Winter 1995). A post-traffic-stop seizure for a dog sniff does not fall into any of these categories. In fact, this Court has specifically foreclosed any argument that an officer may initiate a suspicionless seizure for the purpose of interdicting narcotics. *Edmond*, 531 U.S. at 37.

In *Edmond*, this Court struck down a series of traffic checkpoints in which officers stopped a predetermined number of drivers and conducted dog sniffs on their vehicles in an effort to curb drug crime in Indi-

anapolis. *Id.* at 34-35. The Court held that the Fourth Amendment does not authorize "brief, suspicionless seizures" when the "primary purpose" of the seizure is "to uncover evidence of ordinary criminal wrongdoing"—even if that wrongdoing involves trafficking in illegal narcotics. *Id.* at 37, 42. According to the Court: "We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.* at 44.

When an officer institutes a "brief, suspicionless seizure" to conduct a canine sniff after the conclusion of a traffic stop, she is doing precisely what the Court in *Edmond* prohibited. In fact, suspicionless drug investigations of persons stopped for traffic violations are arguably more intrusive than those conducted through a systemized checkpoint. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976). Routine checkpoints "involve less discretionary enforcement activity" than other kinds of Fourth Amendment seizures. *Id.* "The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." *Id.* A suspicionless detention after a stop for a simple traffic infraction is neither "regularized" nor "reassuring" to motorists who, after receiving a ticket or warning, reasonably expect to be allowed to be on their way. It certainly was not "reassuring" to Mr. Rodriguez, who asserted his right to leave and received in reply a direct order that he stay. J.A. 29, 69-70. *Edmond*'s reasoning therefore applies with even greater force in Mr. Rodriguez's case. To be reasonable under the Fourth Amendment, a post-traffic-stop detention must be supported by individualized suspicion.

In summary, this Court's precedent demands a bright-line rule limiting the permissible scope and duration of a routine traffic stop: the stop ends when the tasks related to the traffic violation have been completed, and any detention beyond that point, however brief, constitutes an unreasonable seizure unless independently supported by individualized suspicion. Officer Struble conducted his dog sniff seven to eight minutes after he had completed his traffic investigation and issued Mr. Rodriguez a warning citation for driving on the shoulder of the road. Because he did not have reasonable suspicion to believe Mr. Rodriguez was involved in criminal activity,[2] Mr. Rodriguez's continued detention violated the Fourth Amendment's prohibition against unreasonable seizures.

II. THE EIGHTH CIRCUIT'S "*DE MINIMIS*" EXCEPTION IS BASED ON FLAWED REASONING AND A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

In the decision below, the Eighth Circuit borrowed the reasoning it first set forth in *United States* v.

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[2] In its Brief in Opposition to a Writ of Certiorari, the Solicitor General argued that Mr. Rodriguez's judgment was independently supported by reasonable suspicion of criminal activity. As discussed further in Section IV of this brief, this is not the case. The Magistrate Judge who considered the evidence at the suppression hearing expressly found *no* reasonable suspicion, and the district court adopted his findings in their entirety. The Eighth Circuit did not disturb this finding on appeal. Therefore, the district court's conclusion should govern the analysis of the constitutionality of Mr. Rodriguez's post-stop detention.

$404,905.00 in U.S. Currency, 182 F.3d 643.[3] In *$404,905.00 in U.S. Currency*, the Eighth Circuit offered three reasons for blurring the bright line that emanates from this Court's precedent: 1) the line marking the end of a traffic stop is "artificial," and Fourth Amendment questions should not be governed by artificial distinctions but by reasonableness under the totality of the circumstances; 2) a brief canine sniff after a stop is similar to the "*de minimis*" intrusion of ordering a lawfully stopped motorist out of his vehicle—a practice this Court upheld in *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110-11 (1977); and 3) a canine sniff is a minimally intrusive procedure that serves a strong governmental interest in drug interdiction. *$404,905.00 in U.S. Currency*, 182 F.3d at 649, *cited with approval in United States* v. *Rodriguez*, 741 F.3d 905 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 43 (Oct. 2, 2014) (No. 13-9972). These reasons are logically unsound and rely on an incorrect reading of this Court's precedent.

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[3] *$404,905.00 in U.S. Currency* marked the genesis of the "*de minimis*" rule in the Eighth Circuit. In *United States* v. *Alexander*, 448 F.3d at 1017, a motorist whose post-stop detention was upheld under this rule asked the Eighth Circuit to revisit the exception in light of *Caballes*, 543 U.S. at 405. The Eighth Circuit declined, noting that the Court in *Caballes* had not been called upon to consider "the length of time that a dog sniff can constitutionally be conducted following the conclusion of a legitimate stop." *Alexander*, 448 F.3d at 1017. Because it saw "no inconsistency between *Caballes* and [*$404,905.00 in U.S. Currency*]," the Eighth Circuit in *Alexander* reaffirmed the "*de minimis*" exception. *Id.* In its short decision in Mr. Rodriguez's case, the Eighth Circuit cited both *$404,905.00 in U.S. Currency* and *Alexander* as the basis for upholding Mr. Rodriguez's detention.

A. The Line Marking The End Of A Traffic Stop Is Not Artificial, And Using It To Gauge The Constitutionality Of The Stop Is An Appropriate Application Of The Fourth Amendment's "Reasonableness" Standard.

The Eighth Circuit's "*de minimis*" exception grew partly out of its belief that the line marking the end of a traffic stop is "quite artificial." *$404,905.00 in U.S. Currency*, 182 F.3d at 649; see also *Alexander*, 448 F.3d at 1017 ("[T]he artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff . . . ."). The court in *$405,905.00 in U.S. Currency* noted that, if the officer who made the stop had managed to conduct the dog sniff before completing the traffic checks, the "sniff would have occurred on the traffic stop side of [the] Fourth Amendment line." 182 F.3d at 649. "When the constitutional standard is reasonableness measured by the totality of the circumstances," the Eighth Circuit observed, "we should not be governed by artificial distinctions." *Id.* For several reasons, this reasoning does not withstand scrutiny.

As an initial matter, the boundaries of a traffic stop are not artificial. Instead, they proceed logically from this Court's Fourth Amendment jurisprudence. In a routine traffic stop, the seizure of a vehicle and its occupants is justified only because the officers have probable cause to believe that the driver committed a traffic violation. *Whren* v. *United States*, 517 U.S. 806, 810 (1996). Because addressing that infraction is the purpose of the stop, the stop must last no longer than necessary to effectuate that purpose. *Caballes*, 543 U.S. at 407; *Royer*, 460 U.S. at 500. If delineating these boundaries requires a "*de minimis*"

extension to relieve it of its artificial character, nearly every other Fourth Amendment doctrine would be subject to the same "horseshoes rule" that "just being close counts." Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1871 (Aug. 2004).

This Court has said that, "normally, [a traffic] stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Johnson*, 555 U.S. at 333. This moment is evident from objective factors. Federal and state courts agree that it typically coincides with the issuance of a citation or warning for the traffic violation and the return of the driver's identification and other documents. See, *e.g.*, *United States* v. *Meikle*, 407 F.3d 670, 673 (4th Cir. 2005); *United States* v. *Wilson*, 413 F.3d 382, 386-87 (3d Cir. 2005); *United States* v. *Boyce*, 351 F.3d 1102, 1106 (11th Cir. 2003); *United States* v. *Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996); *United States* v. *White*, 81 F.3d 775, 778 (8th Cir. 1996); *United States* v. *Rivera*, 906 F.2d 319, 323 (7th Cir. 1990); *United States* v. *Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990); *Lilley* v. *State*, 208 S.W.3d 785, 788 (Ark. 2005); *People* v. *Cosby*, 898 N.E.2d 603, 612 (Ill. 2008); *Ferris* v. *State*, 735 A.2d 491, 500 (Md. 1999); *State* v. *Vogler*, 297 S.W.3d 116, 120 (Mo. Ct. App. 2009); *State* v. *Jones*, 693 N.W.2d 104, 110 (Wis. Ct. App. 2005).[4] Officer Struble pur-

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[4] The fact that the Eighth Circuit has joined the national consensus on this point makes its allegation of "artificiality" even more curious. If the line is not "artificial" when distinguishing between the end of a traffic stop and the beginning of a post-stop consensual encounter, *White*, 81 F.3d at 778-79, it cannot contemporaneously be an "artificial" marker for purposes of deter-

posely returned Mr. Rodriguez's documents and issued him a warning before turning to the matter of the dog sniff. J.A. 69-70. He believed, as the courts do, that these actions got "all the reason for the stop out of the way." *Id.*

That is not to say that the act of returning of a driver's documents and issuing a traffic citation has talismanic qualities, making all police actions before that moment constitutional and everything afterwards unconstitutional without independent justification. "[A] crafty officer, knowing this rule, may simply delay writing a ticket for the initial traffic violation until after she has satisfied herself that all of her hunches were unfounded . . . ." *United States* v. *Stepp*, 680 F.3d 651, 662 (6th Cir. 2012). In cases at the margins, a court still may be required to determine when the tasks related to the traffic infraction were (or should have been) completed. This reality does not make identifying the end of a stop an artificial exercise. Courts all over the country engage in precisely this type of line-drawing on a daily basis.

As an alternative to honoring the Constitution's bright line, the Eighth Circuit puts the officer solely in charge of the point when the traffic stop ends. This alternative cannot be squared with the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'" *Prouse*, 440 U.S. at 654 (footnote omitted) (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978))

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mining what an officer can and cannot do on either side of that line.

(internal quotation marks omitted). A standardless "*de minimis*" rule leaving the end of a traffic stop to the discretion of an officer is incompatible with this fundamental purpose. Such a rule promotes the very arbitrary line-drawing the Eighth Circuit renounces because different officers may draw different lines for different reasons even in the same situation.[5] It may also permit an officer to create "new" probable cause where none existed before, whether by additional

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[5] In some cases, bias may influence where an officer draws the line. Data collected on traffic stops indicates that, in addition to being stopped more often, minorities bear the brunt of an officer's discretionary decisions during a traffic stop. Eith & Durose, *supra* note 1, at 9-10 (during traffic stops, black and Hispanic drivers are more likely than white drivers to be arrested, ticketed, and searched); Neb. Crime Comm'n, *Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement* 4, 16, 20-21 (Apr. 2014), *available at* http://www.ncc.nebraska.gov/pdf/stats_and_research/2013DataFinal.pdf (in Douglas County, Nebraska, where Mr. Rodriguez's stop occurred, minority drivers are stopped, searched, and arrested at a higher rate than their white counterparts); *see also* I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 Harv. C.R.-C.L. L. Rev. 1, 18 (Winter 2011). This includes the discretionary decision to conduct a canine sniff. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 352-53 (1998) (detailing a study of stops made by the Criminal Patrol Unit in Orange County, Florida, where black drivers represented 16.3 percent of drivers stopped but accounted for more than 70 percent of the canine searches); *see also* Christopher M. Pardo, *Driving Off the Face of the Fourth Amendment: Weighing* Caballes *Under the Proposed "Vehicular Frisk" Standard*, 43 Val. U. L. Rev. 113, 127 & n.58 (Fall 2008) (highlighting cases involving actual admissions of racial profiling by police officers). Allowing the police to extend a traffic stop for a "*de minimis*" amount of time, for a dog sniff or any other reason, adds to the list of discretionary decisions that could disproportionately burden minority populations.

questioning, dog sniffs, or further opportunities for observation.

That an officer may undertake a dog sniff *before* the constitutionally mandated line but not *after* is no reason to nullify the line's constitutional significance. Simply put, a dog sniff is not a police entitlement to which Fourth Amendment limits must bend. *Caballes* did not hold otherwise. The Court in *Caballes* permitted the sniff because it caused no disruption to the tasks related to the traffic investigation. 543 U.S. at 408. It accepted the state court's conclusion that the duration of the stop "was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." *Id.* Had the sniff occurred during an "unreasonably prolonged traffic stop" or "while the [driver] was being unlawfully detained," the Court would have reached a different result. *Id.* at 407-08. Thus, the Court in *Caballes* specifically rejected the notion that the boundaries of the Fourth Amendment must be ignored to accommodate a dog sniff.

The Eighth Circuit contends that drawing a bright line at the end of a stop would conflict with this Court's Fourth Amendment standard of "reasonableness measured by the totality of the circumstances." *$404,905.00 in U.S. Currency*, 182 F.3d at 649. But to argue that courts should look to the reasonableness of the seizure as a whole, without regard to whether something happened during the initial stop or during a "*de minimis*" extension of it, is to beg the question of whether the Constitution allows a "*de minimis*" extension in the first place. This argument also assumes that the only possible test for "reasonableness" is a "multifactor balancing test," when in fact this Court has rejected that approach in many cases. *Dunaway* v. *New York*, 442 U.S. 200, 213

(1979). When, "without clear limits[,] [an] exception could swallow the general rule," the Court has adopted categorical rules in which "reasonableness" is clearly defined. *Bailey* v. *United States*, 133 S. Ct. 1031, 1044 (2013) (Scalia, J., concurring).

The "*de minimis*" rule provides no guidance to courts but instead asks them to "measur[e] police conduct according to a virtually standardless yardstick." *Sharpe*, 470 U.S. at 695 (Marshall, J., concurring). It is also of no use to officers in the field, who cannot practically be expected to time their activities with a stopwatch. If the Court endorses such a rule, one can easily imagine the slippery slope that will follow, as courts and officers alike try to determine whether nine, then ten, then fifteen minutes is "*de minimis*."[6] *Whitfield* v. *State*, 33 So. 3d 787, 794 n.11

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[6] Affirming Mr. Rodriguez's case without qualification would by itself allow a seven- to eight-minute post-stop delay. Yet under any plausible definition of the term, such a delay is hardly "*de minimis*." A recent study revealed that an intern can evaluate the health of a new patient in an average of eight minutes. Pauline W. Chen, M.D., *For New Doctors, 8 Minutes Per Patient*, New York Times "Well" Blog (May 30, 2013, 12:01 a.m.), http://well.blogs.nytimes.com/2013/05/30/for-new-doctors-8-minutes-per-patient/. Meanwhile, in *United States* v. *Miller*, 451 F. App'x 896 (11th Cir.), *cert. denied*, 133 S. Ct. 196 (2012), the Eleventh Circuit concluded that a jury deadlocked after nine days of deliberation could reach a verdict free from coercion eight minutes after receiving an *Allen* charge. *Id.* at 897-98 & n.2 (referencing *Allen* v. *United States*, 164 U.S. 492 (1896)). In the time it took for officers to complete the dog sniff of Mr. Rodriguez's case, NASA could send a shuttle all the way into orbit. *Ask the Mission Team—Question and Answer Session*, NASA, http://www.nasa.gov/mission_pages/shuttle/shuttlemissions/sts121/launch/qa-leinbach.html (last visited Nov. 15, 2014). In other words, a great deal can happen in eight minutes. Recognizing this fact, the only other court that has considered such a substantial post-stop delay emphatically rejected the idea that it

(Fla. Dist. Ct. App. 2010) ("If a one[-]minute delay is *de minimis* in case No. 1, the two[-]minute delay in case No. 2 is only a *de minimis* amount longer than the acceptable delay in Case No. 1, and so it goes . . . ."). The "thirty seconds [to] two minutes" the Eighth Circuit endorsed in *$404,905.00 in U.S. Currency*, 182 F.3d at 649, has gradually become the "ten-minute rule" the district court employed, and the Eighth Circuit has found that difference to be of no "constitutional significance." *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001). Although national statistics are not readily available, the median length of a traffic stop in Illinois is just ten minutes. See Ill. Dep't of Transp., *Illinois Traffic Stop Study 2013 Annual Report* 6-7 & Figure 6 (Alexander Weiss Consulting ed., 2013), *available at* http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2013/2013%20ITSS%20Executive%20Summary.pdf. If this is also the case in the Eighth Circuit, the "*de minimis*" exception is well on its way to swallowing the rule.

These difficulties inherent in determining "how much is too much" demonstrate why a bright-line rule for the "reasonableness" of a traffic stop is warranted. *Bailey*, 133 S. Ct. at 1044 (Scalia, J., concurring). Rather than leave the protections of the Fourth Amendment to a "balancing of multifarious circumstances presented by different cases," *Dunaway*, 442 U.S. at 213, this Court should reaffirm the contours of reasonableness that it has already defined, see *Terry*, 392 U.S. at 30; *Edmond*, 531 U.S. at 37.

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could be "*de minimis*." *State* v. *Beckman*, 305 P.3d 912, 918 (Nev. 2013) (nine-minute delay that doubled length of original stop not a "*de minimis*" intrusion).

B. The Justification For The "*De Minimis*" Intrusion Authorized In *Pennsylvania* v. *Mimms* Does Not Transfer To The "*De Minimis*" Extension Of A Traffic Stop.

The Eighth Circuit claims that the brief extension of a traffic stop for a dog sniff is similar to ordering the driver out of the vehicle during a stop. *$404,905.00 in U.S. Currency*, 182 F.3d at 649. This Court held in *Mimms* that such an order is a "*de minimis*" intrusion on personal liberty. *Mimms*, 434 U.S. at 111. Like the Eighth Circuit's claim that a dog sniff must be permitted after a stop because it is permissible before, this argument is an attempt to bootstrap an intrusion authorized in one constitutional context into a reason for holding a citizen in another. The Court should reject this distorted view of the Fourth Amendment.

In deciding that ordering the driver out of his car was permissible, the Court in *Mimms* weighed "the public interest" against "'the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* at 109 (quoting *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). On the public side of the scale, the Court placed the "legitimate and weighty" interest in officer safety. *Id.* at 110. According to the Court, an officer could reasonably conclude that the risks inherent in a traffic stop are mitigated when a driver is outside of his car, in full view. *Id.* at 110-11. Against this interest, the Court weighed the intrusion upon a driver whose liberty already was being restricted by a lawful detention. *Id.* at 111. For someone in this position, the intrusion of being ordered out of the car was negligible. *Id.* "The police have already lawfully decided that the driver shall be briefly detained," the Court noted. *Id.* "[T]he only question is whether he shall spend

that period sitting in the driver's seat of his car or standing alongside it." *Id.* The Court concluded that the insistence that the driver stand outside the car during a lawful stop was not a "'serious intrusion upon the sanctity of the person'" rising to the level of a constitutional violation. *Id.* (quoting *Terry*, 392 U.S. at 17).

Mimms was a highly specific decision tailored to a highly specific context. The intrusion in *Mimms* occurred during a stop justified by probable cause, at a time when the traffic investigation was not yet complete and the motorist was being subjected to far greater intrusions than the "mere inconvenience" he was challenging. *Id.* In fact, this Court took great care to limit its analysis to these circumstances. The driver in *Mimms*, the Court emphasized, was "lawfully detained for a traffic violation." *Id.* at 111 n.6. "[W]e do not hold today that '*whenever* an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car.'" *Id.* (quoting *id.* at 122 (Stevens, J., dissenting) (emphasis added)).

Within the already limited scope of an ongoing traffic investigation, it makes sense to permit certain "*de minimis*" intrusions beyond those occasioned by the stop itself. While the investigation is in progress, law officers are pursuing their legitimate interests in promoting roadway safety and ensuring compliance with traffic laws. *Prouse*, 440 U.S. at 658; see also *Mich. Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990) (discussing states' legitimate interest in eradicating drunk driving). It is important to allow them to complete the tasks attendant to these interests safely. *Mimms*, 434 U.S. at 110. Many of these tasks, like waiting for a records check or writing a ticket, come with built-in "dead time." *United States* v. *Everett*, 601 F.3d 484, 492 (6th Cir. 2010). If, dur-

ing this time, the Constitution were to forbid *any* activities unrelated to the traffic infraction, questions about the weather would constitute a Fourth Amendment event. *United States* v. *Mason*, 628 F.3d 123, 131 (4th Cir. 2010). The Constitution does not require such a result. See *Johnson*, 555 U.S. at 333 (inquiries into matters unrelated to the justification for a traffic stop are permissible provided they do not measurably extend or otherwise change the character of the stop). When a person's liberty has already been restrained, and the intrusion from a particular police practice is merely "incremental," *Mimms*, 434 U.S. at 109, allowing officers reasonable breathing room to complete the traffic investigation achieves a more sensible balance of public and private interests.

This rationale for permitting slight within-stop intrusions does not carry over to post-stop detentions. After the stop is over, the balance between public and private interests shifts. On the public side of the equation, law enforcement interests are reduced to a generalized interest in crime control. While this interest is not insignificant, it does not authorize intrusions that are not justified by individualized suspicion. *Edmond*, 531 U.S. at 44.

The need to accommodate officer safety also carries far less weight once the traffic investigation is over. This is true for two reasons. First, if the officer is legitimately concerned for her safety, she already will have exercised the precautionary measures (like the one in *Mimms*) that the Court has approved for use during a traffic stop. Second, officer safety weighs heavily during an investigatory stop because, as *Terry* holds, officers should not have to take "unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23. After a traffic stop, provided there is no objective basis for suspecting criminal activity,

there are no "duties" for officers to perform. If an officer is concerned for her safety in a post-stop encounter unsupported by individualized suspicion, the logical (and constitutional) step toward a safer environment is to let the driver go.

While the public side of the balance moderates after a traffic stop, individual liberty interests weigh far more heavily on the scale. As set forth above in Section I, the conclusion of a traffic stop and absence of any individualized suspicion return the driver and any passengers to their natural state as citizens, entitled to protection against "police conduct which is over-bearing or harassing, or which trenches upon personal security." *Id.* at 15. The words "overbearing" and "harassing" surely apply to detaining a person on the side of the road to conduct a dog sniff.

"Innocent or guilty, a sniff search is not nothing." *Whitfield*, 33 So. 3d at 794. "It is a humiliating and, for some, a frightening experience." *Id.*; see also *Caballes*, 543 U.S. at 421 (Ginsburg, J., dissenting) ("A drug-detection dog is an intimidating animal."). Although the sniff in *Caballes* was a "seamless event," *Whitfield*, 33 So. 3d at 794, that is not always the case. Drivers and passengers are often ordered from the vehicle, leaving them exposed to the elements and the dangers of standing on the shoulder of the roadway. *Id.*; see also *Mimms*, 434 U.S. at 111 (citing the "hazard of accidental injury from passing traffic" as a danger attendant to a traffic stop).

In addition to being embarrassing and intimidating, a dog sniff can lead to "further intrusive, time-consuming and destructive searches." *Whitfield*, 794 So. 3d at 794. This is true whether a motorist is innocent or guilty. Indeed, studies show that drug-detection canines are wrong nearly as often as they are right. In an Illinois Department of Transporta-

tion study of statewide traffic stops in 2013, analysts reported that dogs erroneously alerted between 36 and 45 percent of the time, with higher error rates for black drivers than for white drivers. Ill. Dep't of Transp., *supra*, at 14. A Chicago Tribune study of earlier Illinois traffic stop data reported that sniffs of vehicles driven by Hispanic drivers had the lowest accuracy rates. In those cases, drugs were found in only 27 percent of vehicles to which canines alerted. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, Chi. Trib. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog (analyzing data collected by the Illinois Department of Transportation from 2007 to 2009).[7] Other studies show similarly high error rates in canine sniffs conducted during traffic stops. See, *e.g.*, Ariz. Dep't of Pub. Safety, *Traffic Stop Data Analysis Study: Year 3 Final Report* 125 & Figure 5.7 (University of Cincinnati Policing Institute ed., 2009), *available at* http://www.azdps.gov/About/Reports/docs/Traffic_Stop_Data_Report_2009.pdf (analysis of 2008 Arizona traffic stop data showed that only 51.9 percent of searches based on a canine alert led to the discovery of contraband). In other words, a startlingly high number of innocent drivers are subjected to full searches of their vehicles based on false alerts by drug-detection canines.

For all of these reasons, a dog sniff conducted during a suspicionless detention is far more intrusive

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[7] Alan Rothacker, a trainer who certifies handlers and dogs in the Chicago area, placed the blame for the low accuracy rates partly on the handlers, as dogs typically react to cues by the handler when the handler believes the person has illegal drugs. Hinkel & Mahr, *supra*.

than the "minor inconvenience" the driver had to endure during the lawful traffic stop in *Mimms*. Because the two situations are constitutionally distinct, any attempt to apply *Mimms*' reasoning to a post-stop canine sniff must fail.

C. The Fact That A Dog Sniff Is Not A Fourth Amendment "Search" Is Immaterial When The Seizure During Which It Occurs Is Itself Unlawful.

The Eighth Circuit's final justification for permitting "*de minimis*" extensions of traffic stops rests on the "uniquely limited investigative procedure" of a canine sniff and its concomitant effectiveness in "interdicting the flow of illegal drugs along the nation's highways." *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (citing *United States* v. *Place*, 462 U.S. 696, 703 (1983)). This argument entirely misses the mark. The Court in *Edmond* acknowledged that a dog sniff is not a "search" under the Fourth Amendment. *Edmond*, 531 U.S. at 40. Nevertheless, it deemed the checkpoints unconstitutional because the *seizures themselves* were unreasonable under the Fourth Amendment. *Id.* at 41-42.

The Court's decision in *Caballes* reinforces this distinction. *Caballes* held that dog sniffs conducted during an otherwise legitimate traffic stop are permissible because they do not separately implicate a constitutionally protected interest in privacy. *Caballes*, 543 U.S. at 408-09. A different result is required, however, if the sniff takes place during an unreasonably prolonged traffic stop or while the driver is being unlawfully detained. *Id.* at 407-08. In the second situation, the dog sniff is not the "cause" but the "consequence" of a constitutional violation. *Id.* at 408.

Contrary to the Eighth Circuit's understanding, then, the fact that a dog sniff is "so unintrusive as not to be a search," *$404,905.00 in U.S. Currency*, 182 F.3d at 649, does not justify a suspicionless detention to enable it. If it did, it is hard to see why it would matter if the suspicionless detention that preceded the sniff occurred after a traffic stop or at any other time.[8] Viewed in this light, the Eighth Circuit's "*de minimis*" exception cannot be reconciled with any reasonable understanding of the Fourth Amendment.

III. A BRIGHT-LINE RULE PROHIBITING THE SUSPICIONLESS EXTENSION OF A TRAFFIC STOP IS EASILY ADMINISTERED IN THE FIELD AND REFLECTS THE PROPER BALANCE BETWEEN LAW ENFORCEMENT INTERESTS AND THE INTERESTS OF INNOCENT MOTORISTS.

"[I]f police are to have workable rules, the balancing of competing interests inherent in the *Terry* principle 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan* v. *Summers*, 452 U.S. 692, 705 n.19 (1981) (quoting *Dunaway*, 442 U.S. at 219-20 (White, J., concurring)). Bright-line rules provide "needed guidance" to officers in the field and leave less room for "manipulation." *Arizona* v. *Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring); see

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[8] Imagine, for example, that an officer approached an individual sitting in a vehicle a few blocks from a recently robbed bank to investigate a suspicion that the person was the robber. Once the officer had satisfied himself that the individual was not the culprit, this Court's precedent would not permit the officer to detain that person several minutes longer to retrieve a drug dog and conduct a sniff of his vehicle. Yet the reasons that the Eighth Circuit gives for approving "*de minimis*" extensions of traffic stops would authorize precisely this type of conduct.

also *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014) (noting Court's "general preference to provide clear guidance to law enforcement through categorical rules"). Given that roughly one out of every twelve Americans is stopped for a traffic violation each year, Eith & Durose, *supra* note 1, at 7, there is perhaps no other area of the law in which easily administered instruction to law enforcement is needed.

Drawing a clear line at the end of a traffic stop does not take drug-detection dogs out of the hands of officers "based solely upon a timing sequence," as one court has asserted. *State* v. *DeLaRosa*, 657 N.W.2d 683, 688 (S.D. 2003). What it does is prevent a dog sniff from becoming a constitutional imperative. If officers wish to conduct a sniff after the tasks related to the traffic infraction have been completed, they may still do so if they have reasonable suspicion or probable cause of criminal activity. Requiring individualized suspicion vastly decreases the chance that innocent motorists will be needlessly ensnared in dragnet drug investigations. At the same time, it should increase the ratio of "hits" to "sniffs," making the canine sniff a more efficient weapon in the effort to curb narcotics trafficking. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 427-31 (Winter 1996-97) (demonstrating through analysis of false positive indications that canine sniffs are more effective when implemented in tandem with law enforcement expertise than when randomly conducted).

Under the bright-line rule dictated by this Court's precedent, police officers who wish to conduct a canine sniff also will retain the ability to seek consent to search. The effectiveness of this tool should not be underrated. While Mr. Rodriguez did not consent to the dog sniff here, he is in the minority in refusing.

Studies show that a great number of motorists *do* consent to searches when asked, even if it is contrary to their self-interests. Eith & Durose, *supra* note 1, at 10 (reporting that 60 percent of vehicle searches conducted during traffic stops in 2008 occurred with driver consent); LaFave, *supra*, at 1891 & n.274 (citing a study of Maryland and Ohio traffic stops, in which nearly 90 percent of motorists consented when officers asked to search their vehicles).

In summary, a decision recognizing a constitutionally significant line at the conclusion of a traffic stop beyond which any further detention requires individualized suspicion simplifies traffic stops and protects innocent motorists. At the same time, it leaves law enforcement officers ample tools to investigate any new criminal activity that may come to light. This Court should adopt this rule and reverse the judgment of the Eighth Circuit.

IV. THE POST-STOP DETENTION IS NOT INDEPENDENTLY JUSTIFIED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

In its Brief in Opposition to a Writ of Certiorari, the Solicitor General argued that reasonable suspicion justified detaining Mr. Rodriguez beyond the completion of the traffic investigation. Gov't Op. at 11. The *only* court to have addressed this issue, however, found that Officer Struble had nothing but a "big hunch." J.A. 104. The Magistrate Judge who conducted the suppression hearing and heard the testimony of Officer Struble found that the officer had no reasonable suspicion to detain Mr. Rodriguez after

issuing the citation, and the district court adopted that conclusion in its entirety. J.A. 103-04, 115.[9]

A trial court has "superior access to the evidence," *United States* v. *Arvizu*, 534 U.S. 266, 276 (2002), as well as superior knowledge of "distinctive features and events of the community." *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). As a consequence, a court reviewing reasonable suspicion must "review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges . . . ." *Id.* A reviewing court owes particular deference to credibility findings, as it is the trial judge who "'hears the testimony, observes the witnesses' demeanor[,] and evaluates the facts first hand . . . .'" *United States* v. *Martinez*, 762 F.3d 127, 130 (1st Cir. 2014) (quoting *United States* v. *Young*, 105 F.3d 1, 5 (1st Cir. 1997)); see also *Neil* v. *Biggers*, 409 U.S. 188, 203 (1972) (Brennan, J., concurring in part and dissenting in part) (explaining "'two-court rule,'" where deference is given to trier of fact who

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[9] On a motion to suppress evidence, a district court properly may delegate to a United States Magistrate Judge the task of conducting an evidentiary hearing. *United States* v. *Raddatz*, 447 U.S. 667, 673-75 (1980) (discussing intent and constitutionality of the Federal Magistrates Act, 28 U.S.C. § 636). It must, however, make a *de novo* determination of any of the Magistrate Judge's findings and recommendations to which a party objects. 28 U.S.C. § 636(b)(1). The district court may, on that determination, reject or modify those findings in whole or in part. *Id.* When the district court adopts the Magistrate Judge's findings in their entirety, those findings become the findings of the district court. *Raddatz*, 683-84. Because "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the [district] judge," findings adopted by the district court are entitled to the same deference as findings made at a proceeding at which the district court itself presided. *Id.* at 682 (quoting *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976)).

has had "a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses").

In its Brief in Opposition, the Solicitor General offered no new reasons for the Court to consider that would overcome Magistrate Judge Gossett's express finding. While Judge Gossett found Officer Struble "credible as to [timing of the events that occurred during the traffic stop]," he said he "ha[d] some doubts about the fact that he ha[d] these suspicions." J.A. 95. These credibility findings are entitled to deference, *Ornelas*, 517 U.S. at 699, and that deference should end the matter. The Court should uphold Judge Gossett's ruling on the reasonable suspicion issue.

Even without the necessary deference, the facts on this relatively sparse and now closed record do not provide the "particularized and objective basis for suspecting . . . criminal activity" required to uphold Mr. Rodriguez's post-stop detention. *United States* v. *Cortez*, 449 U.S. 411, 417-18 (1981) (stating the "essence" of the reasonable suspicion test). Officer Struble offered four grounds for suspecting Mr. Rodriguez was involved in criminal activity: 1) an overwhelming odor of air freshener emanating from the vehicle; 2) Mr. Pollman's nervous behavior; 3) Mr. Rodriguez's decision not to sit in Officer Struble's patrol car while Officer Struble investigated the traffic violation; and 4) Mr. Pollman's explanation for why the two men had been in Omaha, which Officer Struble did not find believable. None of these factors, individually or in concert, provide grounds for a post-stop detention.

It is true that air fresheners are sometimes used to mask the smell of narcotics. See, *e.g.*, *United States* v. *Fuse*, 391 F.3d 924, 929-30 (8th Cir. 2004); *United States* v. *Salzano*, 158 F.3d 1107, 1114 (10th Cir.

1998). However, air fresheners have legitimate purposes as well, as they are manufactured and marketed to cover up the smells of everyday life that can build up inside a vehicle. Many innocent people have them in their cars. Officer Struble testified that the odor emanating from the vehicle, while strong, "was a pleasant smell," which is not often the case when used in quantities necessary to mask drug odors. J.A. 51. He could not even identify whether the odor came from a spray or a hanging tree or a "little Glade vent," much less if there was more than one air freshener in the vehicle. *Id.* Cf. *United States* v. *Robinson*, 529 F. App'x 134, 138-39 (3d Cir. 2013) (significant number of air fresheners, among other factors, supported reasonable suspicion for expanding the scope of a traffic stop); *United States* v. *Branch*, 537 F.3d 328, 338 (4th Cir. 2008) ("the presence of several air fresheners" supported finding of reasonable suspicion); *United States* v. *Goss*, 256 F. App'x 122, 124 (9th Cir. 2007) ("numerous, strangely placed air fresheners" contributed to reasonable suspicion). Unless the Court is prepared to hold that the *mere presence* of an air freshener establishes reasonable suspicion of criminal activity, this factor should carry very little weight. Reasonable suspicion may not properly be based upon circumstances which "describe a very large category of presumably innocent travelers." *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980).

Mr. Pollman's nervousness is a similarly weak indicator of criminal activity. First, the conduct that Officer Struble considers "nervous" behavior is in fact completely innocuous. Officer Struble said he noted the nervousness when he was speaking to an agitated Mr. Rodriguez from the passenger window of the Mountaineer. J.A. 21-22. Under these circumstances, Mr. Pollman's behavior was a natural reaction to be-

ing "stuck in the middle." Mr. Pollman pulled his cap down so it wouldn't be in the way, continued to smoke his cigarette (a habit that is not exclusive to criminals), and did not look at Officer Struble, who was not speaking to him anyway. *Id.* And later, when Officer Struble was directly questioning Mr. Pollman about the purpose of the trip, Officer Struble did not mention any nervousness. This fact undercuts the judgment Officer Struble made about Mr. Pollman's earlier behavior.

Second, even if Mr. Pollman's behavior early in the stop *was* a sign of nervousness, that would not be out of the ordinary. "[M]ost citizens—whether innocent or guilty—[ ] exhibit signs of nervousness when confronted by a law enforcement officer." *United States* v. *Wood*, 106 F.3d 942, 948 (10th Cir. 1997). Nervousness is therefore "of limited significance in determining reasonable suspicion." *United States* v. *Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994); see also *United States* v. *Noble*, 762 F.3d 509, 522 (6th Cir. 2014); *United States* v. *Massenburg*, 654 F.3d 480, 490 (4th Cir. 2011); *United States* v. *Jones*, 269 F.3d 919, 928 (8th Cir. 2001). Nothing in Officer Struble's description indicates excessively nervous behavior, especially compared to behavior cited as unusual by this Court. *Florida* v. *Harris*, 133 S. Ct. 1050, 1053 (2013) (driver was "unable to sit still, shaking, and breathing rapidly"); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) (defendant exhibited excessive nervousness by fleeing from police); *Maryland* v. *Wilson*, 519 U.S. 408, 410 (1997) (driver's hands were shaking and passenger was sweating); *United States* v. *Mendenhall*, 446 U.S. 544, 548 (1980) (defendant became so nervous when approached by DEA agents she had a hard time speaking). Again, the context of the stop is important in evaluating Mr. Pollman's

"nervousness." Mr. Rodriguez and Mr. Pollman were pulled over in the middle of the night because the passenger wheels of the Mountaineer had crossed onto the shoulder of the road for about one or two seconds. J.A. 48. Since the reason for the stop was not an obvious one, and in fact had to be explained to an understandably agitated Mr. Rodriguez, some nervousness (if it was there) was to be expected.

The next fact that raised Officer Struble's suspicion was Mr. Rodriguez's decision not to accompany him to the police cruiser. But Mr. Rodriguez was well within his rights to refuse that request. See *Terry*, 392 U.S. at 34 (White, J., concurring) ("Of course, the person stopped [in a *Terry* detention] is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . ."); see also *Berkemer*, 468 U.S. at 439-40 (analogizing traffic stop to *Terry* detention, and concluding that its "nonthreatening" character means that questioning of a motorist during the stop does not constitute "custodial interrogation"). Moreover, although Officer Struble found Mr. Rodriguez's response suspicious, he had no basis for drawing that conclusion. The reason that courts give "due weight" to the judgment of police officers is because their "experience and specialized training" may allow them "to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu*, 534 at 273 (quoting *Cortez*, 449 U.S. at 418). But Officer Struble had never before had anyone refuse to sit in his vehicle. J.A. 52-53. He therefore had no "experience" or "cumulative information" on which to determine that such conduct was consistent with criminal activity. J.A. 53-54. Officer Struble's experience as a police officer was limited to begin with: he had been a law enforcement of-

ficer for less than two years, including less than a month in the tiny town of Valley, Nebraska.[10] J.A. 38.

Finally, Officer Struble said he was suspicious of the reason Mr. Pollman gave for their travel. Mr. Pollman told Officer Struble that he and Mr. Rodriguez lived in Norfolk and had driven to Omaha to look at an older Mustang that someone was looking to sell for about $6,500. J.A. 60-61. They did not view pictures of the vehicle before they drove to Omaha and did not purchase the car because they discovered the seller did not have the title. Office Struble found this story suspicious because it was "not something [he] would do." J.A. 26. He was also bothered by the fact that it was "after midnight on a Tuesday and they drove over two hours to look at a vehicle in the dark." J.A. 60.

None of these observations provide reason for suspecting criminal activity. As an initial matter, the fact that Officer Struble himself would not have made the same choices does not make what Mr. Rodriguez and Mr. Pollman did suspicious. Facts supporting reasonable suspicion must be based on "more than the mere subjective impressions of a particular officer." *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989). Additionally, there is no evidence to support Officer Struble's assumption that Mr. Rodriguez and Mr. Pollman had made a two-hour trip to see a car in the dark. Since Officer Struble did not ask when the men had left Norfolk, when they had seen the car, or what they had done

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[10] Valley has a population of approximately 1,800 residents. *City Profile*, City of Valley, Nebraska, http://www.valleyne.org/index.aspx?nid=532 (last visited Nov. 12, 2014).

before or after seeing it, his conclusion as to their itinerary was nothing but speculation.

Even assuming that Officer Struble was correct about the timing of Mr. Rodriguez and Mr. Pollman's trip, that timing is not indicative of criminal activity. A vehicle, especially a popular vintage one, is worth looking at in person before handing over a significant amount of money. Buyers and sellers who work during the day may have only the evening hours for such activities. It takes approximately two hours to drive from Norfolk to Omaha, so a person who leaves Norfolk after the work day would arrive in Omaha at about 8:00 p.m. Officer Struble stopped Mr. Rodriguez at about midnight in Valley, Nebraska, which is about thirty minutes into a return trip from the center of Omaha. Three and one-half hours is not an unreasonable amount of time in Omaha if one accounts for introductions and small talk, looking at the vehicle, negotiating details, and perhaps a stop or two for dinner or an errand. It is no wonder, given these innocuous facts, that the Magistrate Judge found that Officer Struble had nothing more than a "hunch" that criminal activity was afoot. An officer's hunch cannot support a finding of reasonable suspicion. *Terry*, 392 U.S. at 22-23. The detention of Mr. Rodriguez beyond the conclusion of the traffic stop violated his rights under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eighth Circuit and affirm the district court's finding of no reasonable suspicion.

Respectfully submitted,

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November 17, 2014

RESPONDENT'S BRIEF

No. 13-9972

In the Supreme Court of the United States

DENNYS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in the context of a traffic stop, a police officer may conduct a dog sniff of a vehicle after issuing a written traffic warning, where the traffic stop was not unreasonably prolonged.

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In the Supreme Court of the United States

No. 13-9972

DENNYS RODRIGUEZ, PETITIONER

v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 127-131) is reported at 741 F.3d 905. The opinion of the district court (J.A. 110-115) is not published in the *Federal Supplement* but is available at 2012 WL 5458427.

JURISDICTION

The judgment of the court of appeals (J.A. 132-133) was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014, and granted on October 2, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted on one count of possessing with intent to distribute 50 grams or more of a mix-

ture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). J.A. 116. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. J.A. 117, 199. The court of appeals affirmed. J.A. 127-131.

1. Just after midnight on March 27, 2012, Morgan Struble, a canine officer with the Valley Police Department in Nebraska, was in his patrol car with his drug-sniffing dog, Floyd, when he observed the vehicle petitioner was driving veer slowly onto the shoulder of the highway and then jerk back onto the road. J.A. 16-19. Officer Struble observed the vehicle cross the fog line and drive for several seconds on the shoulder of the road before it reentered the traffic lane. J.A. 19-20. Nebraska law prohibits driving on highway shoulders, Neb. Rev. Stat. Ann. § 60-6,142 (LexisNexis 2010), as well as failing to maintain a lane, *id.* § 60-6,139(1). At 12:06 a.m., Officer Struble initiated a traffic stop of the vehicle. J.A. 26. The vehicle was occupied by petitioner and a front-seat passenger, Scott Pollman. J.A. 24.

As Officer Struble approached the vehicle, he noticed an "overwhelming" odor of air freshener. J.A. 20-21, 54. According to Struble, the use of "overwhelming" air freshener is a "common tactic" for covering up the scent of contraband such as illegal drugs. J.A. 54. Struble also observed that Pollman had his hat pulled down over his eyes, was looking straight ahead, and would not make eye contact, as if he did not want to be seen. *Ibid.* In Struble's view, Pollman appeared unusually nervous for a mere passenger in a stopped vehicle. J.A. 34.

Officer Struble advised petitioner of the reason for the stop, and petitioner stated that he had driven on

the shoulder to avoid a large pothole in the roadway. J.A. 22, 46. In the officer's view, that explanation was inconsistent with his observation of petitioner's vehicle "slow[ly]" veering onto the shoulder, remaining there, and then "jerk[ing] back to the roadway." J.A. 46-47. After Struble collected petitioner's license, registration, and proof of insurance, he asked petitioner to sit in the patrol vehicle while a records check was completed. J.A. 23. Petitioner asked if he was required to do so, and Struble responded that he was not. *Ibid.* Petitioner declined to accompany the officer and instead waited in his own vehicle. *Ibid.* Struble later testified that, in his time as a police officer, he had never encountered anyone else who was "so adamant against" sitting in the patrol vehicle. J.A. 53. Struble believed that petitioner's behavior indicated that he did not want to be far from his vehicle or its contents. *Ibid.* Struble explained that, in his experience, "people concealing contraband" tend not to "want to distance themselves too much from their contraband." J.A. 53-54.

After Officer Struble ran a records check on petitioner, he returned to petitioner's vehicle. J.A. 24. He asked Pollman for identification and asked where the two men were coming from and where they were going. *Ibid.* Pollman stated that they had traveled to Omaha, Nebraska, to look at a car that was for sale and that they were returning to Norfolk, Nebraska. *Ibid.* Pollman also stated that he had not seen any pictures of the vehicle before making the trip. J.A. 25. Officer Struble found it "suspicious" and "abnormal" that the men would drive four hours to Omaha and back "that late at night to see a vehicle sight unseen to possibly buy it." J.A. 26, 60-61. Pollman also stated

that he had not bought the vehicle because the seller did not have its title. J.A. 26, 61. Struble found it similarly unlikely that the two men would have driven that distance to look at a car without obtaining any title information in advance. J.A. 26, 60-61.

Officer Struble returned to his patrol car to run a records check on Pollman. At that point, at 12:19 a.m., he also called for a second officer because he wanted another officer present, for safety reasons, if he performed a dog sniff. J.A. 27, 71-72. While waiting on the second officer, Struble issued a written warning to petitioner, noting the time on the warning as 12:25 a.m. J.A. 29. Struble finished handing the warning to petitioner and explaining it to him at 12:27 or 12:28 a.m. *Ibid.* Struble also returned all the documents to both petitioner and Pollman. J.A. 27. After petitioner signed the written warning, Struble gave petitioner a copy of the document. *Ibid.*

Officer Struble then asked permission to walk his dog around petitioner's vehicle. J.A. 29. When petitioner refused consent, Struble directed petitioner to step out of the vehicle. *Ibid.* Petitioner rolled up the windows of his car and then stood in front of the patrol car with Struble while Struble waited for the second officer. J.A. 29-30. After the second officer arrived at 12:33 a.m., Struble retrieved his dog and led him around petitioner's car, and, within 20 to 30 seconds, the dog alerted to the presence of drugs. J.A. 31-33. All told, seven or eight minutes had passed from the time Struble had issued the written warning until the dog indicated the presence of drugs, which means that Floyd alerted around 12:35 a.m. J.A. 33. Based on the dog's alert, Struble then searched peti-

tioner's vehicle and uncovered a large bag of methamphetamine. J.A. 34.

2. Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Petitioner moved to suppress the drugs seized from his car, arguing that the dog sniff had occurred during an unlawful detention that was not supported by reasonable suspicion of criminal activity.

After an evidentiary hearing, a magistrate judge issued oral findings and a recommendation to deny the motion to suppress. J.A. 95-103. At the outset, the judge found Officer Struble, the only witness who had testified at the suppression hearing, to be credible. J.A. 95. The judge declined to find that reasonable suspicion had supported the detention after Struble issued the written warning, J.A. 103-104, but, citing Eighth Circuit precedent, concluded that the extension of the stop by "seven to eight minutes" for the dog sniff was only a de minimis intrusion on petitioner's Fourth Amendment rights. J.A. 100-101 (citing *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (1999), cert. denied, 528 U.S. 1161 (2000)).

The district court agreed with the magistrate judge. J.A. 110-115. Emphasizing that Officer Struble had "requested backup for officer safety," that the backup officer had "responded in a short period of time" and that the drug dog was already in Struble's car and was deployed "immediately" after the backup officer arrived, the court concluded that the traffic stop had not been "prolonged beyond the time reasonably required to complete the mission of the stop."

J.A. 114. The court explained that dog sniffs that occur "within a short time following the completion of a traffic stop" are permissible if "de minimis" and that the delay caused by Struble's dog sniff was de minimis. *Ibid.* (citation omitted). The district court did not address whether reasonable suspicion supported extending petitioner's detention, beyond generally stating that it was adopting the magistrate judge's findings. *Ibid.*

In light of the denial of his motion to suppress, petitioner entered a conditional guilty plea, reserving his right to appeal the district court's Fourth Amendment ruling. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. J.A. 116-117, 119.

3. The court of appeals affirmed the denial of the motion to suppress. J.A. 127-131. In accordance with *Illinois* v. *Caballes*, 543 U.S. 405 (2005), the court explained that "[a] dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in privacy." J.A. 130 (quoting *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting *Caballes*, 543 U.S. at 408)). The court rejected petitioner's argument that the stop was "unreasonably prolong[ed]" by the "brief delay" in deploying the dog. *Ibid.* The court explained that the dog sniff had been delayed only because Officer Struble had waited for a second officer to arrive out of concern "for his safety because there were two persons in [petitioner's] vehicle." J.A. 130-131. Noting that it had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded," the court concluded that the "seven- or

eight-minute delay" in this case was—like the brief delays in those cases—only a "de minimis intrusion on [petitioner's] personal liberty." *Ibid.* (citing *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001), cert. denied, 537 U.S. 849 (2002); *$404,905.00 in U.S. Currency*, 182 F.3d at 649). The court thus held that no Fourth Amendment violation had occurred. J.A. 131.

The court of appeals did not address the government's argument that the police had a reasonable suspicion that petitioner was engaged in criminal activity, independently justifying further detention.

SUMMARY OF ARGUMENT

I. This Court has held that a dog sniff may be a reasonable incident of a traffic stop. See *Illinois* v. *Caballes*, 543 U.S. 405 (2005). That is true even if the sniff incrementally prolongs the stop. The sequence of events during the stop, including whether a ticket is issued before or after conducting the sniff, does not affect the reasonableness of the sniff: the test remains whether the stop's overall duration remains objectively reasonable. Under that analysis, the dog sniff here was reasonable.

A. When an officer conducts a traffic stop based on probable cause to believe the driver has committed a traffic violation, the Fourth Amendment permits the officer to conduct a number of investigative inquiries before resolving the traffic violation, so long as the stop does not last an unreasonably long time.

First, the officer may conduct inquiries designed to resolve the traffic violation, such as verifying the validity of the driver's license and registration. For his and the community's safety, the officer may also conduct warrant and criminal-history checks. Traffic

stops that include those inquiries are reasonable if the officer has performed his tasks in an amount of time "reasonably needed to effectuate" the law-enforcement purpose of the stop. *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985).

Second, an officer may conduct inquiries into unrelated criminal activities during a traffic stop, even without reasonable suspicion. This Court has approved two such investigatory inquiries: performing a dog sniff, and questioning the vehicle's occupants about matters unrelated to the traffic violation. See *Caballes*, 543 U.S. at 407; *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009).

B. *Caballes* permits a dog sniff to prolong a traffic stop, so long as the total duration of the stop remains reasonable. In *Caballes*, the Court explained that the dog sniff must not "unreasonably prolong[]" the stop "beyond the time reasonably required" by the traffic-compliance purpose of the stop. 543 U.S. at 407. Although petitioner contends that *Caballes* established a rule that a dog sniff may not prolong the stop at all, *Caballes* did not so hold. And such a bright-line prohibition would conflict with basic Fourth Amendment principles. Under *Sharpe*, an officer's performance of investigatory tasks that routinely occur in any stop does not violate the Fourth Amendment, even if it extends the stop's duration, so long as the overall duration of the stop remains reasonable. 470 U.S. at 685. But petitioner's bright-line rule would unjustifiably treat dog sniffs differently.

Courts considering dog sniffs and unrelated questioning conducted during a traffic stop have generally applied a reasonableness analysis. Recognizing that such investigatory acts may add seconds or minutes to

the duration of a stop, courts have generally held that such delays are permissible, so long as the officer acted reasonably diligently and the stop did not last longer than reasonably required to resolve the traffic violation.

C. An officer's issuing a traffic ticket before performing a dog sniff does not render the reasonableness inquiry inapplicable. The order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing. Petitioner's proposed bright-line prohibition on performing a dog sniff after issuing a ticket would arbitrarily distinguish between traffic stops that affect the individual interest at stake—*i.e.*, the interest in avoiding an unreasonably long detention—in essentially identical ways. The bright-line rule would also unduly constrain officers' discretion to conduct investigatory inquiries in the order warranted by the particular circumstances of a traffic stop.

D. A dog sniff performed after issuance of a ticket is permissible so long as it does not "unreasonably prolong[]" the stop beyond the time "reasonably required" to resolve the traffic violation. *Caballes*, 543 U.S. at 407. In undertaking that inquiry, a court should consider the total duration of the stop in relation to the duration of traffic stops involving similar circumstances; the proportion of the stop attributable to the dog sniff; and the officer's diligence throughout.

E. Petitioner's arguments for a bright-line prohibition on post-ticket dog sniffs are without merit. Petitioner contends that after the ticket is issued, the motorist is in the same position as someone who is first encountering the police—but that ignores the

fact that the motorist has lawfully been detained on probable cause to believe he has committed a traffic violation. The relevant question is whether the continuing detention is constitutionally reasonable. Petitioner also argues that a reasonableness inquiry would be unworkable. Numerous lower courts, however, readily evaluated the reasonableness of stops involveing pre- and post-ticket dog sniffs and unrelated investigatory questioning based on the factors suggested above.

F. The dog sniff at issue in this case was valid because it did not unreasonably prolong the traffic stop. The approximately 29-minute duration of the stop was within the range of other similar traffic stops. The seven-to-eight-minute delay attributable to the dog sniff did not represent an unduly large portion of the stop, and it was occasioned by the officer's reasonable need to have backup present for safety reasons. Officer Struble acted with reasonable diligence throughout the stop, including by calling for backup well before he had completed the tasks necessary to issue the ticket.

II. The extension of petitioner's traffic stop to conduct a dog sniff was independently justified by Officer Struble's reasonable suspicion—unrelated to petitioner's traffic offense—that unlawful activity was taking place. Although the court of appeals did not rule on that issue, this Court may affirm on that alternative ground.

ARGUMENT

I. A POLICE OFFICER MAY CONDUCT A DOG SNIFF DURING A TRAFFIC STOP, AFTER ISSUING A TRAFFIC TICKET, SO LONG AS THE DETENTION IS NOT UNREASONABLY PROLONGED

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. When a police officer stops a vehicle based on probable cause to believe the driver has committed a traffic violation, the driver and passengers are lawfully seized. *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); see, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (when officer observes violation of traffic law, "there is no question about the propriety of the initial restrictions" imposed by a traffic stop). Here, Officer Struble stopped petitioner's vehicle based on probable cause after observing it cross the fog line and drive on the shoulder of the road. See *State* v. *Magallanes*, 824 N.W.2d 696, 701 (Neb. 2012), cert. denied, 133 S. Ct. 2359 (2013); see Neb. Rev. Stat. Ann. § 60-6,142 (LexisNexis 2010) ("No person shall drive on the shoulders of highways."). The stop was therefore lawful at its inception.

A traffic stop that is lawful at its inception remains subject to reasonableness constraints in its execution. A stop normally entails a variety of procedures to safely execute the stop, address the concerns that prompted it, and permit reasonable investigatory activities. In evaluating the conduct of a traffic stop, the Court has observed that "[t]he touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal secu-

rity." *Mimms*, 434 U.S. at 108-109 (internal quotation marks and citation omitted).

A dog sniff may be a reasonable incident of a traffic stop. See *Illinois* v. *Caballes*, 543 U.S. 405 (2005). That is true even if the sniff may incrementally prolong the stop. And the sequence of events during the stop, including whether a ticket is issued before or after conducting the sniff, does not affect the reasonableness of the sniff: the test remains whether the stop's overall duration remains objectively reasonable. Under that analysis, the dog sniff here was reasonable.

A. An Officer May Conduct A Range Of Investigatory Inquiries In A Traffic Stop, So Long As The Stop Is Not Unreasonably Prolonged

Decisions of this Court and lower courts establish that an officer conducting a traffic stop may generally conduct a range of investigatory inquiries, subject to the overarching rule that the stop does not "unreasonably infringe[] interests protected by the Constitution." *Caballes*, 543 U.S. at 407. Those well-accepted inquiries fall into two general categories. First, an officer may perform actions that are reasonably necessary to investigate and resolve the traffic violation, such as verifying the validity of a driver's license and vehicle registration. Second, an officer may undertake investigatory actions that are not related to the traffic violation itself, but instead are designed to detect other criminal activity. Those activities include sniffs by drug-detection dogs, see *ibid.*, and questioning about unrelated matters, *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009). Those inquiries are permissible, even though they are not directed to resolving the traffic violation, because they do not constitute inde-

pendent searches or seizures for Fourth Amendment purposes. In the context of traffic stops in which the officer performed such inquiries before resolving the traffic violation, the Court has held that such inquiries are permissible if they do not unreasonably prolong the traffic stop. See *Caballes*, 543 U.S. at 407.

1. Officers may conduct inquiries designed to resolve the traffic violation and safely conduct the stop

a. Courts have uniformly recognized that a routine traffic stop permits the officer to "ask[] for the driver's license [and] the vehicle's registration, as well as inquir[e] about the occupants' destination, route, and purpose." *United States* v. *Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005).[1] Often the officer will request insurance documentation to ensure that the driver is complying with state law requiring liability insurance.[2] Once the officer obtains the license and insurance documentation from the driver, he must check the license to verify the driver's identity and confirm that the driver is licensed to operate the vehicle. The officer ordinarily performs that task either by running a search on an in-car computer or by radioing the police dispatcher for assistance.[3] The officer will also perform a records check on the vehicle's registration and vehicle identification number in order to verify that

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[1] See also, *e.g.*, *United States* v. *Digiovanni*, 650 F.3d 498, 507 (4th Cir. 2011) (routine actions include "requesting a driver's license and vehicle registration, running a computer check, and issuing a ticket"); *United States* v. *Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005), cert. denied, 549 U.S. 889 (2006).

[2] *United States* v. *Zavala*, 541 F.3d 562, 577 (5th Cir. 2008).

[3] See, *e.g.*, *People* v. *Turriago*, 681 N.E.2d 350, 352 (N.Y. 1997) (computer check); *State* v. *England*, 19 S.W.3d 762, 765 (Tenn. 2000) (dispatcher check).

the vehicle is registered in compliance with state law and is not stolen.[4] Finally, the officer may ask questions about the occupant's destination and plans, as the answers may provide relevant context or an explanation for the driver's traffic violation.[5]

Similarly, officers also regularly perform records checks to determine whether the vehicle's occupants have outstanding warrants or criminal history.[6] Although these checks may not be directly related to resolving the underlying traffic violation,[7] they serve important officer-safety concerns that arise in any traffic stop by allowing an officer to know who he is dealing with.[8] Cf. *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 186 (2004) ("Knowledge of identity [gained in a reasonable-suspicion stop] may inform an officer that a suspect is wanted for another offense, or has a record of violence."). Courts accord-

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[4] *Zavala*, 541 F.3d at 576.

[5] *United States* v. *Brigham*, 382 F.3d 500, 508 n.6 (5th Cir. 2004) (en banc).

[6] See, *e.g.*, *United States* v. *Garcia*, 205 F.3d 1182, 1187 (9th Cir.) (warrant checks are "standard" procedure in all stops), cert. denied, 531 U.S. 856 (2000); *United States* v. *Purcell*, 236 F.3d 1274, 1278 (11th Cir.) (criminal-history checks are "routine"), cert. denied, 534 U.S. 830 (2001).

[7] See *United States* v. *Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (en banc) (per curiam) ("[A] motorist may be detained for a short period while the officer runs a background check to see if there are any outstanding warrants or criminal history pertaining to the motorist even though the purpose of the stop had nothing to do with such prior criminal history."), overruling on other grounds recognized in *United States* v. *Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007).

[8] See *United States* v. *Burleson*, 657 F.3d 1040, 1046 (10th Cir. 2011).

ingly have uniformly held that an officer may "routine[ly]" perform warrants and criminal history checks, even when the officer has no basis to believe that the motorists have warrants or a criminal record. See generally 4 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 512-519 (5th ed. 2012) (LaFave).

b. The longer the officer takes to complete these routine traffic-stop steps, the longer the detention of the vehicle's occupants will last. Yet the stop remains reasonable so long as the officer has performed his tasks with reasonable diligence and in an amount of time "reasonably needed to effectuate" the law-enforcement purpose of the stop. *United States* v. *Sharpe*, 470 U.S. 675, 685-686 (1985).

In *Sharpe*, the Court rejected the lower court's "*per se* rule that a 20-minute detention is too long to be justified" in the context of a vehicle stop based on reasonable suspicion, explaining that a stopwatch approach is "clearly and fundamentally at odds with our approach in this area." 470 U.S. at 686. The Court explained that the duration of a temporary seizure must be reasonable under the circumstances and that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Ibid.* The Court cautioned, however, that courts should not "second-guess[]" police officers' decisions by "imagin[ing] some alternative means by which" the police could have accomplished their objectives more quickly. *Id.* at 686-687.

Following *Sharpe*, courts evaluating whether the length of a routine traffic stop is reasonable have considered the totality of the circumstances, recognizing that the time it takes a reasonably diligent officer

to perform routine traffic-stop tasks may vary widely based on the situation. See *United States* v. *Branch*, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision."), cert. denied, 555 U.S. 1118 (2009).

c. The duration of a traffic stop may often depend on how the officer engages in police work—whether he runs a warrant check, for instance, or how thoroughly he investigates a driver's authority to operate a rental car. Consistent with *Sharpe*, courts have held that officers may reasonably choose their investigative methods in response to things that happen during the stop, even if their decisions lengthen the stop. See *Sharpe*, 470 U.S. at 688; see also, *e.g.*, *United States* v. *Brigham*, 382 F.3d 500, 511 (5th Cir. 2004) (en banc) (no "per se rule" governs the order of tasks or length of stop); *United States* v. *Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) ("We underline that the police are not constitutionally required to move at top speed or as fast as possible."), cert. denied, 549 U.S. 889 (2006).

The length of the stop may also vary for reasons not within the officer's control. For instance, a records check of a license, registration, or criminal history might reasonably take anywhere between several seconds and 40 minutes, depending on circumstances such as the officer's need to rely on the dispatcher to perform the search or a driver's provision of false information. See generally LaFave § 9.3(c), at 508-509 & n.155, 512 n.170 (citing cases). Courts have eschewed any per se rules governing whether a stop is unreasonably prolonged. Instead, they have consid-

ered the total duration of the stop, as well as the reason for any delay.[9]

2. *Officers may perform certain investigatory actions unrelated to the traffic violation*

An officer conducting a traffic stop may also perform investigatory tasks that are not related to the traffic justification for the stop, including executing a dog sniff and asking questions about unrelated criminal activity. The leeway for an officer to do so reflects the recognition that, so long as the officer does not branch out into unjustified searches or otherwise render the manner of the stop unreasonable, it is socially beneficial for the officer to remain alert to the possibility of criminal activity by the motorist or his passengers worthy of police intervention. See *Hernandez*, 418 F.3d at 1212 n.7 ("For the police to be vigilant about crimes is, at least broadly speaking, a good thing."). As with investigatory tasks directly related to the traffic violation, the constitutionality of the seizure ultimately turns on whether it was unreasonably prolonged under the circumstances.

This Court has made that principle clear in the context of both dog sniffs and investigatory questioning. In *Caballes*, this Court held that the Fourth Amendment permits an officer to perform a dog sniff during

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[9] See, *e.g.*, *Digiovanni*, 650 F.3d at 511 ("[A] multitude of factors can affect the length of a traffic stop, some working in favor of the government, others in favor of the defendant. For example, some computer checks will take longer than others, depending on the speed of the computers involved and whether the car's occupants possess in-state or out-of-state identifications."); *United States* v. *Douglas*, 195 Fed. Appx. 780, 784 (10th Cir. 2006) (noting that circumstances such as computer problems and difficulty verifying license can reasonably result in stops lasting over 30 minutes).

an otherwise lawful traffic stop, even though the drug-detection sniff is unrelated to the traffic violation. 543 U.S. at 407-408. The Court thus rejected the Illinois Supreme Court's conclusion that the dog sniff "unjustifiably broadened the scope of an otherwise routine traffic stop into a drug investigation." See *People* v. *Caballes*, 802 N.E.2d 202, 204 (2003), vacated and remanded, *Illinois* v. *Caballes*, 543 U.S. 405 (2005); *Caballes*, 543 U.S. at 408. The Court explained that even if "the use of the dog converted the citizen-police encounter * * * into a drug investigation," that "shift in purpose" did not render the traffic stop unreasonable because the dog sniff itself was not a "search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408. Because the sniff did not infringe any "constitutionally protected interest in privacy," the Court held that performing a dog sniff does "not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Ibid.*

Similarly, in *Johnson*, 555 U.S. at 333, the Court held that an officer may ask a detained motorist investigatory questions that are unrelated to the underlying traffic violation. The Court explained that, like a dog sniff, questioning is not a search or seizure for Fourth Amendment purposes. See *Muehler* v. *Mena*, 544 U.S. 93, 101 (2005). The Court accordingly held that "inquiries into matters unrelated to the justification for the traffic stop" "do not convert the encounter into something other than a lawful seizure, so long as [they] do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333.

B. An Officer May Perform A Dog Sniff During A Traffic Stop So Long As It Does Not Unreasonably Extend The Stop

This Court held in *Caballes* that a dog sniff is a permissible incident of a traffic stop if the stop is not "unreasonably prolonged" as a result. 543 U.S. at 407. Thus, a dog sniff may incrementally prolong a stop, as long as the total duration of the stop does not exceed that reasonably required to resolve the traffic violation. Lower courts have therefore generally applied a reasonableness analysis to unrelated questioning and dog sniffs that extend a traffic stop.

1. Caballes permits a dog sniff to extend a stop, so long as the stop does not exceed the time reasonably required to resolve the traffic violation

Petitioner argues (Br. 21, 25) that the Court indicated in *Caballes* that a dog sniff may not prolong a stop *at all*—in other words, that *Caballes* established a bright-line rule that a dog sniff that adds even a minimal amount of time to the stop is per se unreasonable. In petitioner's view (Br. 25), an officer may conduct a dog sniff during a traffic stop only if the sniff occurs simultaneously with some other action related to resolving the traffic stop. That reading of *Caballes* is unsound.

In *Caballes*, this Court explained that the primary limitation on an officer's authority to perform a dog sniff is the reasonableness of the stop's duration: the dog sniff must not "unreasonably prolong[]" the stop. 543 U.S. at 407. The Court elaborated that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time *reasonably required to*

complete that mission." *Ibid.* (emphasis added).[10] But the Court did not hold that whenever a dog sniff lengthens the stop by any amount of time, the delay automatically causes the stop as a whole to exceed the time "reasonably required" to resolve an ordinary traffic stop under similar circumstances.[11] *Ibid.* And a bright-line prohibition on dog sniffs that extend the traffic stop by any amount of time, no matter how minimal, would conflict with basic Fourth Amendment principles.

a. Under *Sharpe*, the basic test for the validity of a stop is its overall objective reasonableness in light of all of the circumstances. Under that principle, basic investigation that routinely occurs in any stop does

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[10] *Caballes* cited *People* v. *Cox*, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003), overruled, *People* v. *Bew*, 886 N.E.2d 1002 (Ill. 2008), as an example of an "unreasonably prolonged" stop, 543 U.S. at 407-408, but that decision does not shed light on whether a dog sniff may permissibly prolong a traffic stop for some amount of time. In *Cox*, an officer stopped a motorist for a routine, minor traffic violation and detained her for 15 minutes while awaiting a canine unit, which arrived while the first officer was writing the ticket. *Cox* held that 15 minutes far exceeded the "time reasonably needed to effectuate" the purpose of the traffic stop and that the officer had "stall[ed]" in order to facilitate the dog sniff. 782 N.E.2d at 280 (quoting *Sharpe*, 470 U.S. at 685). It is thus unclear whether the court found the stop's duration unreasonable because it concluded that the dog sniff must have added some delay to the stop, and any delay was per se impermissible; or because the court concluded that the amount of delay was unreasonable under the circumstances.

[11] The Court observed that the lower courts had found that the "duration of the stop in this case was entirely justified by the traffic offense." *Caballes*, 543 U.S. at 408. The Court therefore had no occasion to consider a situation in which the dog sniff added some time to the traffic stop.

not violate the Fourth Amendment, even if it extends the stop's duration, so long as the overall duration of the stop remains reasonable. But petitioner's bright-line rule would unjustifiably treat dog sniffs differently.

Imagine two similar traffic stops involving dog sniffs: (1) a traffic stop conducted by a single officer who decides to perform a warrant check on a passenger in the vehicle, just to be thorough, such that the entire stop takes 15 minutes (instead of the 14 minutes it would have taken without the extra warrant check); and (2) a traffic stop conducted by a single officer who decides to perform a dog sniff, such that the entire stop takes 15 minutes (instead of the 14 minutes it would have taken had the officer not performed the sniff). Under petitioner's view, the incremental delay imposed by the warrant check in the first stop would be permissible if it were deemed reasonable under *Sharpe*—but the exact same incremental delay caused by the dog sniff in the second stop would be per se unreasonable.

Nothing in the Fourth Amendment justifies that disparity. *Caballes* and *Johnson* establish that dog sniffs and unrelated questioning do not run afoul of any scope limitation on traffic stops, and they do not constitute independent searches or seizures. See pp. 17-18, *supra*. Consequently, the individual interest implicated by stops involving unrelated inquiries is the same as the interest at stake in traffic stops solely focused on the traffic violation: the interest in not being detained for an unreasonably long period of time. See *Caballes*, 543 U.S. at 407. Given the identity of the individual Fourth Amendment interests involved, the constitutionality of stops involving some

unrelated tasks should be evaluated under the same reasonableness framework that applies to routine traffic stops, *i.e.*, by assessing the reasonableness of the total duration of the stop in light of the officer's diligence. See *Sharpe*, 407 U.S. at 686; pp. 15-17, *supra*.

b. Petitioner's reading of *Caballes* would also lead to arbitrary results within the universe of traffic stops involving pre-ticket dog sniffs or unrelated questioning. Under petitioner's view, *Caballes* permits an officer to perform a dog sniff or ask unrelated questions only if he happens to be able to shoehorn those activities into "dead time" that otherwise would be spent waiting for a records check or the like. Pet. Br. 25 (citation omitted). But an officer's ability to do that will vary based on factors that have little to do with the officer's diligence or the severity of the intrusion.

i. An officer's ability to multitask—to perform a dog sniff simultaneously with other activities during the traffic stop—will vary widely. If a traffic stop is conducted by two officers, one might be able to conduct the dog sniff while the other performs tasks related to the traffic violation, such as communicating with the dispatcher about the vehicle's registration. If the stop is conducted by a single officer, however, multitasking will often be impossible. The officer will have to perform tasks seriatim, and that will often prolong the stop. See, *e.g.*, *United States* v. *Patterson*, 472 F.3d 767, 777 n.3 (10th Cir. 2006) (quoting officer testimony that it takes "more time for me to get my dog out, stop writing the warning, run my canine around the vehicle, the two trips or whatever it took, put him back up and finish the warning and get my returns," than it does to have a second officer

perform the sniff), vacated on other grounds, 555 U.S. 1131 (2009).

Even assuming a single officer has "dead time" spent awaiting the dispatcher's report of a records check, police safety procedures and individual canine-handler characteristics may determine whether he is actually able to perform a dog sniff during that time. Conducting a dog sniff requires the officer to pay close attention to the dog to watch for changes in behavior that signal interest in a particular area or detection of narcotics. Sandy Bryson, *Police Dog Tactics* 260 (2000) (Bryson). Because focusing intently on the dog may leave a single officer vulnerable to attack, police procedures often require the canine officer to have backup present for the sniff, so that the backup officer can observe the vehicle's occupants and the surrounding area while the canine officer focuses on the dog.[12] A single officer performing a traffic stop may therefore have to call for backup before performing the sniff, which may lengthen the stop.

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[12] See, *e.g.*, U.S. Police Canine Ass'n, *Patrol & The Police K9, A Manual for Back-up Officers & Supervisors*, http://www.uspcak9.com/training/k9manual.html (last visited Dec. 15, 2014) (back-up "[o]fficers should be focused on their surroundings * * * [t]he Officer should be alert and prepared to deal with a threat * * * [a]s the [dog] handler may be out flanked or out numbered by multiple suspects"); Bryson 260 ("When a drug dog is searching a vehicle on a car stop * * * the team needs a cover officer in charge of the occupants. The K-9 officer has to concentrate his full attention on his dog without worrying about getting shot in the back or people running away. The handler is fully occupied working his dog."); *State* v. *Griffin*, 949 So. 2d 309, 311 (Fla. Dist. Ct. App. 2007) (Florida police procedures require another officer to be present for a dog sniff.).

In addition, even apart from the need for backup, a single officer's ability to perform a sniff while awaiting the results of a records check may vary based on the dog itself. Different dogs alert differently, and a particular dog's alert to the scent of narcotics may consist solely of subtle behavioral changes that the officer might overlook if he is listening on the radio for the dispatcher's report or is otherwise distracted.[13]

For both single- and multiple-officer stops, moreover, the existence of "dead time" may turn on the happenstance. For instance, patrol-car equipment may have a determinative impact: some patrol cars are equipped with a computer that enables an officer to perform records checks in a matter of seconds, and those officers will not expect to have any minutes-long time lag while waiting to hear from a dispatcher.[14]

ii. Similarly fortuitous circumstances would be determinative of the constitutional permissibility of unrelated questioning. Multiple officers might be able to conduct questioning and traffic-related tasks simultaneously, but single officers might have more trouble doing so. An officer might pause in writing a ticket, or

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[13] See, *e.g.*, Bryson 260 ("the handler whose attention is diverted will miss a higher percentage of behavioral changes by the dog"); Utah POST K-9 Program, *Narcotics Detector Dog Performance Objectives* 59 (Mar. 13, 2012), http://www.publicsafety.utah.gov/post/inservice/documents/NarcoDogGradeSheets20120313.pdf (an alert may consist of subtle changes in behavior, such as a sudden head movement, changes in breathing, and "fixated" behavior).

[14] See LaFave § 9.3(c), at 512-513 (contrasting "almost instantaneous" availability of records data when police officer has computer, with the minutes-long delay when police rely on older technology); Police Bureau, City of Portland, *Anatomy of a Traffic Stop*, https://www.portlandoregon.gov/police/article/258015 (last visited Dec. 15, 2014) (discussing use of in-car computers).

linger at the person's car, in order to ask questions, and if the initial answers provoke follow-up questions, that conversation might delay the progress of the traffic stop by a few minutes. See, *e.g.*, *United States* v. *Turvin*, 517 F.3d 1097, 1102 (9th Cir. 2008) (officer stopped writing citation to confer with another officer and then asked driver additional questions, a process that added four minutes to the traffic stop). And again, the existence of "dead time" that might provide leeway to question the vehicle's occupants may turn on fortuity or police-department resources.

iii. In sum, conditioning the reasonableness of a traffic stop involving a dog sniff or questioning on the officer's ability to multitask would grant fortuitous circumstances dispositive constitutional weight. Again, two hypothetical stops illustrate the anomaly. In the first stop, conducted by two officers, one officer is able to perform the sniff while the other checks the license and registration, such that the entire stop takes 14 minutes. In the second stop, conducted by a single officer who cannot perform the sniff at the same time as other tasks, the entire stop takes 15 minutes, instead of the 14 minutes it would have taken had the officer not performed the sniff. In petitioner's view, the first stop would be constitutionally permissible but the second impermissible, thereby giving dispositive weight to the extra minute—without considering whether the incremental additional intrusion in the second stop truly impinged on the individual's Fourth Amendment interest against unreasonable detention.

That result would also be in considerable tension with this Court's refusal to permit the scope of the Fourth Amendment's protection in connection with a traffic stop to depend on local law enforcement prac-

tices. *Whren* v. *United States*, 517 U.S. 806, 815 (1996). In *Whren*, the Court held that the reasonableness of a traffic stop did not turn on whether the officer had violated local police policies in conducting the stop. *Ibid.* The Court explained that under such a regime, the reasonableness of the stop at issue would have depended on "trivialities" such as whether the officer had violated a department prohibition on plain-clothes stops, or was instead "wearing a uniform or patrolling in a marked police cruiser." *Ibid.* Petitioner's reading of *Caballes* and *Johnson* as imposing bright-line rules would permit just such trivialities, such as whether officers work in pairs or have access to high-tech computer systems, to control the Fourth Amendment analysis.

2. Courts considering dog sniffs and unrelated inquiries made before the issuance of a ticket have generally assessed the overall reasonableness of the stop

The common-sense conclusion that stops that were briefly lengthened by unrelated inquiries are not per se unconstitutional is reflected in the approaches taken by most of the lower federal courts that have addressed the issue. Although they have employed varying analyses, those courts have generally measured the validity of the encounter by considering its overall objective reasonableness.

The courts of appeals have most clearly addressed the framework for analyzing a stop lengthened by unrelated inquiries in the context of police questioning. Under *Johnson*, an officer may engage in unrelated investigatory questioning that does not "measurably" extend the traffic stop. 555 U.S. at 333. Recognizing the practical reality that questioning often lengthens the duration of the stop by seconds or

minutes, courts have generally permitted such delays under a reasonableness analysis. See *United States* v. *Everett*, 601 F.3d 484, 491 (6th Cir. 2010) (explaining that a "measurable" delay is one that is "significant," *i.e.*, that unreasonably prolongs the stop); cf. *United States* v. *Valenzuela*, 494 F.3d 886 (10th Cir.) (rejecting argument that officer "was only permitted to ask questions unrelated to the traffic stop while he was writing out a ticket, waiting for dispatch, or conducting some other investigative procedure related to the initial purpose of the stop," as too "narrow" and formalistic), cert. denied, 552 U.S. 1032 (2007). In *Everett*, for instance, the Sixth Circuit held that the "vast weight of authority" supported the conclusion that unrelated questioning may prolong a stop, so long as the "duration of the *stop as a whole* * * * was reasonable" and the officer's "overall course of action during a traffic stop, viewed objectively and in its totality, is reasonably directed toward the proper ends of the stop." 601 F.3d at 492, 494-495. Of the other courts of appeals to consider the issue, the vast majority have employed a similar reasonableness analysis; only the Fifth Circuit has adopted a bright-line rule.[15]

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[15] See *United States* v. *Griffin*, 696 F.3d 1354, 1362 (11th Cir. 2012) (rejecting "bright-line no prolongation rule" and assessing "the length of the stop as a whole, including any extension of the encounter," under the totality of the circumstances) (citation omitted), cert. denied, 134 S. Ct. 956 (2014); *United States* v. *Mason*, 628 F.3d 123, 131-132 (4th Cir. 2010) (one and a half minutes of unrelated questioning was reasonable because it was "slight" in relation to the total duration of the stop), cert. denied, 132 S. Ct. 329 (2011); *United States* v. *Harrison*, 606 F.3d 42, 45 (2d Cir. 2010) (per curiam) ("entire process" must be reasonable) (citation omitted); *United States* v. *Rivera*, 570 F.3d 1009, 1013 (8th Cir. 2009) (questions did not "unreasonably prolong" stop);

In the context of dog sniffs performed before issuance of a citation, those courts of appeals that have considered situations in which the sniff was found to have lengthened the stop have applied a reasonableness analysis. See *United States* v. *Carpenter*, 406 F.3d 915, 916-917 (7th Cir. 2005) ("modest incremental delay" of up to five minutes waiting for dog to arrive was not unreasonable in the context of the stop); see also *United States* v. *Rivera*, 570 F.3d 1009, 1013-1015 (8th Cir. 2009) (based on totality of circumstances, delay of less than two minutes for dog sniff did not unreasonably prolong stop); see also *United States* v. *Green*, 740 F.3d 275, 280 (4th Cir.) (stating in dicta that any "de minimis" delay in conducting traffic-related tasks that resulted from dog sniff was not unreasonable), cert. denied, 135 S. Ct. 207 (2014); *United States* v. *Stepp*, 680 F.3d 651, 662-663 (6th Cir. 2012) (analyzing dog sniff "much the same way we analyze extraneous questioning" and noting that "slight" "extension" of stop for a dog sniff is not "unreasonable," but concluding that delay of three and a half minutes for dog sniff, added to six minutes of extraneous questioning, rendered stop unreasonable under the circumstances).[16] Other courts have stated

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Turvin, 517 F.3d at 1101-1102 (considering total duration of stop and relative length of delay; four-minute delay for questioning during a 14-minute stop was reasonable); *Valenzuela*, 494 F.3d at 888; *United States* v. *Childs*, 277 F.3d 947, 954 (7th Cir.) (en banc) (asking whether the "entire process remain[ed] reasonable"), cert. denied, 537 U.S. 829 (2002). But see *United States* v. *Pack*, 612 F.3d 341, 350 (5th Cir.) (unrelated questioning may not extend stop), cert. denied, 131 S. Ct. 620 (2010).

[16] Some state courts have undertaken similar analyses. See *People* v. *Thomas*, No. 3-12-0676, 2014 WL 5426813, at *4 (Ill. App. Ct. Oct. 27, 2014) (single officer "deviat[ed] from writing a warning

that the proper inquiry is whether the dog sniff unreasonably prolonged the stop under the circumstances, but in cases in which the sniff apparently did not add any additional time to the stop. It is therefore unclear whether those courts view that analysis as permitting some incremental additional delay attributable to the dog sniff. See, *e.g.*, *United States* v. *Bell*, 555 F.3d 535, 542 (6th Cir.) (question is whether police "unreasonably delayed the stop"; officers may "deviate" from purpose of stop by taking dog around vehicle), cert. denied, 557 U.S. 945 (2009); *United States* v. *Figueroa*, 425 Fed. Appx. 15, 17 (2d Cir.

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ticket" to conduct dog sniff, but "avoided any undue delay"); *Johnson* v. *Commonwealth*, 179 S.W.3d 882, 884, 886 (Ky. Ct. App. 2005) (upholding sniff that caused "brief delay" but did not "prolong the stop to any unreasonable extent"); *Wilson* v. *State*, 666 S.E.2d 573, 575-576 (Ga. Ct. App. 2008) (considering officer's diligence, total duration, and "minimal" time attributable to dog sniff); *State* v. *Arias*, 752 N.W.2d 748, 761-762 (Wis. 2008) (stop prolonged by 78 seconds for dog sniff was reasonable under the totality of the circumstances); *People* v. *Chan*, No. G040871, 2013 WL 6843598, at *3 (Cal. Ct. App. Dec. 30, 2013) (five-minute delay for dog sniff, patdown, and warrant check in context of seven-minute stop was reasonable because stop was not extended beyond time reasonably required to resolve traffic violation); *State* v. *Fowler*, No. 105,752, 2011 WL 6311112, at *4 (Kan. Ct. App. Dec. 2, 2011) (per curiam) (declining to apply a bright-line rule, but finding that delay for sniff was unreasonable where officers did not proceed expeditiously); *Griffin*, 949 So. 2d at 314-315 (finding 90-second delay for sniff reasonable); cf. *People* v. *Wofford*, 969 N.E.2d 383, 392 (Ill. App. Ct. 2012) (concluding that 17-minute stop was not unreasonably prolonged where officer performed each step diligently, without separately analyzing dog sniff that added one minute to stop). Other courts, however, appear to have disapproved any delay beyond that necessary to resolve the traffic violation. See, *e.g.*, *State* v. *Gray*, 997 N.E.2d 1147, 1152 (Ind. Ct. App. 2013).

2011) (considering length of stop as a whole and whether there was "unreasonable delay"); *United States* v. *Montes*, 280 Fed. Appx. 784, 791 (10th Cir. 2008) (considering overall reasonableness of stop). To our knowledge, no court of appeals has definitively adopted and applied the bright-line rule in a published opinion. Cf. *United States* v. *Bonilla*, 357 Fed. Appx. 693, 697 (6th Cir. 2009) (disapproving sniff where officer stopped writing ticket to perform sniff when backup arrived).

C. When An Officer Conducts A Dog Sniff After, Rather Than Before, Issuing A Ticket, That Sequencing Decision Should Not Render The Reasonableness Inquiry Inapplicable

The same reasonableness analysis should apply regardless of the order in which the officer performs his investigatory tasks. Issuance of a ticket in the midst of a stop does not make the performance of other investigatory actions inherently unreasonable. Rather, the order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing that does not alter the intrusiveness of the stop. To institute, as petitioner proposes, a bright-line prohibition on an officer's performing a dog sniff after issuing a ticket would arbitrarily distinguish between functionally identical traffic stops that have the same impact on individual interests.

1. When during a traffic stop the officer issues a ticket is not an event of constitutional significance

Because an officer's authority in a traffic stop is not strictly cabined by the traffic justification for the stop,

and the duration of the stop can be prolonged by investigatory actions, see pp. 19-26, *supra*, the officer's issuance of a ticket before performing a dog sniff does not render the sniff per se unreasonable. The issuance of the ticket does not transform the ensuing detention into something constitutionally different from a detention that occurs before the ticket is issued. As petitioner notes (Br. 12), the issuance of the ticket ordinarily signifies that the officer has completed tasks related to the traffic violation. But that simply means that a subsequent dog sniff will be directed to a matter other than the traffic violation—which is also the case when an officer performs the sniff before issuing the ticket. Issuing the ticket before the sniff makes clear that the subsequent detention incrementally extends the stop beyond the time minimally required to address the traffic violation. But the same incremental delay can occur when the officer conducts the sniff before issuing the ticket.

Viewed in light of the constitutionally protected interest at stake—the interest against an unreasonably prolonged detention—an officer who conducts a sniff after issuing a ticket does not commit any greater intrusion than an officer who conducts a sniff before issuing the ticket. Both events place the motorist in the same position: he is subject to a probable-cause traffic stop that is briefly extended by a dog sniff. The delay must not unreasonably prolong the stop. But whether the sniff occurs before or after the ticket is issued is purely a matter of sequencing that should not be accorded independent constitutional significance. See *Valenzuela*, 494 F.3d at 890 ("Our cases do not focus on the order of events.").

A pair of hypothetical dog sniffs, both conducted by a single officer, illustrates the point:

- In the first, beginning at 12:00, the dispatcher takes seven minutes to check the driver's license and registration. At 12:07, the dispatcher reports to the officer that the driver's license and registration are valid. The officer begins to write up a ticket but does not give it to the driver. At 12:09, the officer begins to perform the dog sniff. The dog alerts at 12:10.
- In the second, also beginning at 12:00, the dispatcher again takes seven minutes, reporting back at 12:07. The officer writes up the ticket and decides to give it to the driver before getting his dog out of the patrol car. The officer begins the dog sniff at 12:09, and the dog alerts at 12:10.

From the individual's perspective, each stop involves exactly the same intrusion, in character and degree. Each stop lasted the same amount of time, each involved equally expeditious officer conduct, and each was prolonged by the same amount of time to permit the dog sniff to occur. When the ticket was issued during the course of the stop plays no role in determining the severity of the intrusion or whether the officer's conduct was reasonable under the circumstances.

A bright-line rule forbidding any sniff conducted after the issuance of a ticket, even if it prolongs the stop by mere seconds, would therefore give talismanic significance to a characteristic of the stop that has nothing to do with, and no effect on, the constitutionally protected interest at stake. To apply a reason-

ableness analysis to the first dog sniff described above, while categorically barring the second, would arbitrarily treat individuals who have been subjected to materially similar intrusions differently. See *State* v. *DeLaRosa*, 657 N.W.2d 683 (S.D. 2003) (rejecting bright-line prohibition on post-ticket dog sniffs because the nature and degree of the intrusion is the same whether the sniff is performed before or after the ticket's issuance); cf. *Whren*, 517 U.S. at 815 ("We cannot accept that the search and seizure protections of the Fourth Amendment are so variable.").

2. Petitioner's proposed bright-line rule would have adverse consequences

Imposing a per se bar on post-ticket dog sniffs would intrude on the officers' legitimate conduct of traffic stops. Legitimate law-enforcement considerations may prompt an officer to finish issuing a ticket before turning to a dog sniff or other inquiry. But under the bright-line approach, officers will lack the flexibility to issue a citation first under any circumstances.

Some officers, for instance, prefer to use the issuance of the citation as a reason to ask the driver to step out of the vehicle so that the officer can hand him the citation and explain it. During that conversation, the second officer then conducts the dog sniff—which thus may take place after the time noted on the citation, and after the driver has signed the citation.[17] Petitioner's rule would discourage that practice, which promotes officer safety by providing a nonconfrontational means of asking the vehicle's occupants to step

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[17] See *State* v. *Cargile*, No. 38855, 2013 WL 5979328, at *4 (Idaho Ct. App. Jan. 14, 2013).

out of the car and keeping them engaged during the dog sniff.[18] Alternatively, an officer might use the issuance of the citation or warning as an opportunity to further observe the driver's behavior to help decide whether a dog sniff is warranted.[19]

In other situations, it may minimize the intrusion on the individual to issue the citation shortly before performing a dog sniff. When a single officer calls for a canine team or a backup officer to facilitate the sniff, for instance, the officer might save time by completing the ticket while awaiting the other officer. Petitioner's rule would prevent that. And an officer who is in the midst of writing a ticket when the canine team arrives would not be able to take the natural action of completing the ticket and handing it to the driver as the canine officer is preparing to perform the sniff.[20] An officer also would be unable to issue a citation while awaiting the results of a records check—even if doing so would reduce the total length of the stop.[21]

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[18] Cf. *Bell*, 555 F.3d at 537-538 (officers used explanation of traffic warning as a reason to ask the driver to step out of the car before the dog sniff was performed).

[19] See *United States* v. *Simms*, 385 F.3d 1347, 1354 (11th Cir. 2004) (driver's continued nervousness after being informed he would receive only a verbal warning influenced decision to conduct search), cert. denied, 544 U.S. 988 (2005).

[20] See, *e.g.*, *State* v. *Brimmer*, 653 S.E.2d 196, 199 (N.C. Ct. App. 2007) (canine team arrived as officer was giving ticket to driver; officer completed and issued the ticket and then explained the dog sniff, which occurred immediately thereafter); *Griffin*, 949 So. 2d at 315 (backup officer arrived while patrol officer was writing ticket; the officer stopped what he was doing and did not finish the ticket until after the dog sniff).

[21] Cf. *United States* v. *Purcell*, 236 F.3d 1274, 1277-1279 (11th Cir.) (stop not rendered unreasonable because criminal-history

Rigidly constraining officers in this manner would run counter to the principle that law-enforcement officers should be given broad discretion, within the bounds of reasonableness, "to graduate their responses to the demands of any particular situation." *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983); *Sharpe*, 470 U.S. at 686-687 (courts should not "second-guess[]" officers' reasonable choices, even if those choices do not result in the least restrictive possible detention). It would make the constitutionality of traffic stops turn not on the ultimate reasonableness of the intrusion, but instead on the outcome of "a mad dash by one officer and dog to the stopped vehicle while the other officer checks out the driver's papers." *DeLaRosa*, 657 N.W.2d at 689. And if the rule encouraged an officer to draw out the ticket-writing process while her partner completed a dog sniff or a canine unit arrived on the scene, it would have little constitutional benefit.[22]

In sum, to give the order in which the officer chooses to perform permissible actions during a traffic stop talismanic significance—as petitioner's bright-line prohibition would do—would give rise to arbitrary results without meaningfully furthering the individual interests protected by the Fourth Amendment. "Constitutional rights should be based upon reasonable-

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check was not completed until after officer gave citation), cert. denied, 534 U.S. 830 (2001).

[22] A defendant could, of course, later argue that the officer dragged his feet while writing the ticket and therefore displayed an objective lack of diligence that made the stop unreasonable under *Sharpe*. But courts would likely find it difficult to say that an officer who took seven minutes rather than three to write a ticket violated constitutional standards of diligence.

ness of the totality of the government intrusion, rather than a mere bright-line rule based solely upon a timing sequence." *DeLaRosa*, 657 N.W.2d at 688.

D. A Post-Ticket Dog Sniff Is Permissible If The Officer Does Not Unreasonably Prolong The Stop

Rather than any per se rule, the same basic reasonableness inquiry that applies when a dog sniff is conducted before a ticket is issued should apply when the order of proceedings is reversed. The overarching question is whether the performance of the dog sniff "unreasonably prolonged" the traffic stop—*i.e.*, extended it beyond the time "reasonably required to complete [the] mission" of resolving the traffic violation, in light of all the circumstances. *Caballes*, 543 U.S. at 407.

1. A traffic stop as a whole, "viewed objectively and in its totality," must be "reasonably directed toward the proper ends of the stop," such that the stop's duration does not exceed that reasonably required to conduct similar traffic stops. *Everett*, 601 F.3d at 495. Courts "do not simply look at the 'interval of prolongation in isolation,' but rather assess the length of the stop as a whole, including any extension of the encounter." *Griffin*, 696 F.3d at 1362 (quoting *Everett*, 601 F.3d at 494).

Consistent with that analysis, the courts that have employed a reasonableness analysis to determine the permissibility of post-ticket dog sniffs have considered the length of the stop, the time spent on the sniff, and the totality of the circumstances. See, *e.g.*, *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 649 (8th Cir. 1999) (considering total length of stop and relative delay caused by dog sniff in order to determine "reasonableness measured by the totality

of the circumstances"), cert. denied, 528 U.S. 1161 (2000); *United States* v. *Johnson*, 331 Fed. Appx. 408, 410 (7th Cir. 2009) (two-minute post-ticket delay preceding dog sniff was not unreasonable in context of 12-minute stop); *DeLaRosa*, 657 N.W.2d at 687 (post-ticket sniff added minimal time to stop; *State* v. *Box*, 73 P.3d 623, 629-630 (Ariz. Ct. App. 2003) (upholding brief post-ticket delay); *Brimmer*, 653 S.E.2d at 199-200 (90-second delay was reasonable); *People* v. *McQuown*, 943 N.E.2d 1242, 1248 (Ill. App. Ct. 2011) (38-minute post-ticket delay for dog sniff unreasonably prolonged stop, where officer wrote ticket after ten minutes and did not call for a canine unit until 13 minutes after that).[23]

2. Applying an approach that considers the duration of the stop, the length of the dog sniff, and the officer's diligence provides a practicable test for assessing the reasonableness of post-ticket issuance sniffs.

If the total duration of the stop does not exceed the bounds of the range of permissible traffic stops—and in particular, stops involving similar underlying circumstances—the stop is more likely to be reasonable. See *Turvin*, 517 F.3d at 1101-1102 (14-minute stop that included unrelated questioning was within the

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[23] Courts have employed a similar analysis in cases not involving dog sniffs. See, *e.g.*, *United States* v. *Garrido-Santana*, 360 F.3d 565, 573 (6th Cir.) (stop was not rendered unreasonable by fact that officer ran a computer check on defendant's authority to drive rental car and the results did not arrive until after the citation was issued; continued detention was not "intrusive"), cert. denied, 542 U.S. 945 (2004); *United States* v. *Hill*, 195 F.3d 258, 269 (6th Cir. 1999) (fact that license check results did not come back until after citation issued did not render stop unreasonable), cert. denied, 528 U.S. 1176 (2000); *Purcell*, 236 F.3d at 1277-1279.

bounds of an ordinary traffic stop). When an individual is stopped for committing a traffic violation, he can reasonably expect to be detained for a period of time that varies from several minutes to 40 minutes or more, depending on the circumstances. See pp. 16-17, *supra*. Evaluating the total length of the stop in question against the range of ordinary traffic stops will help determine whether the stop exceeded the length of detention to which the traffic violation itself may expose a driver. Looking in particular at how long traffic stops involving similar circumstances might take—for instance, stops involving multiple vehicle occupants—will provide a more refined sense as to how much time might be "reasonably required" to resolve similar traffic stops. *Caballes*, 543 U.S. at 407.

Also relevant is the proportion of the total stop that represents the delay attributable to the dog sniff (or other unrelated inquiry). If an officer spends the bulk of an 11-minute stop on matters directly related to the traffic violation, and then prolongs the stop for two minutes to perform a dog sniff, the incremental intrusion on the individual's interests is small in relation to the overall detention justified by the traffic violation. See *Mason*, 628 F.3d at 132 ("The one to two of the 11 minutes devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); see also *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (two-minute post-ticket sniff was reasonable when stop lasted five to eight minutes). But if the delay arising from a dog sniff constitutes a substantial portion of the stop as a whole, the stop is more likely to have been primarily focused on drug detection, and to have exceeded the amount of time "reasonably re-

quired" to resolve traffic violations involving similar circumstances. *Caballes*, 543 U.S. at 407; see, *e.g.*, *Wells* v. *State*, 922 N.E.2d 697, 700 (Ind. Ct. App. 2010) (delay of 20 minutes due to dog sniff, which doubled the length of the stop, was unreasonable); *McQuown*, 943 N.E.2d at 1248-1249.

The officer also must have been reasonably diligent in pursuing the traffic-related purpose of the stop. See p. 15, *supra*. Since an officer may pursue unrelated inquiries during a traffic stop, it follows that the officer need not spend every second pursuing the traffic violation itself in order to be reasonably diligent. See *Everett*, 601 F.3d at 495; *Turvin*, 517 F.3d at 1102-1103. Rather, the relevant consideration is the officer's "overall course of action" and whether it is "reasonably directed" toward resolving the traffic stop. *Everett*, 601 F.3d at 495. Here again, the proportion of time spent on the unrelated inquiry is relevant. See *United States* v. *Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (stop was unreasonably prolonged where officer spent ten minutes of 15-minute stop questioning the driver about drug possession). Courts should also consider whether the officer performed each task expeditiously in light of the circumstances, as well as the reasonableness of any justification for a delay.

E. Petitioner's Arguments For A Bright-Line Prohibition On Post-Ticket Dog Sniffs Are Unpersuasive

1. Petitioner's primary argument is that once an officer issues a ticket, the "motorist is in the same legal position as a citizen walking on a public sidewalk," and such a citizen may not be detained initially without individualized reasonable suspicion of criminal wrongdoing. Pet. Br. 13 (citing *City of Indianapolis*

v. *Edmond*, 531 U.S. 32, 37 (2000)). But a motorist who has just been issued a ticket is *not* in the same position as someone approached on the street who has had no previous interaction with the police. The motorist has lawfully been detained on probable cause to believe he has committed a traffic violation, and the issuance of the ticket does not end that detention unless a reasonable person would feel free to leave. See *Brendlin* v. *California*, 551 U.S. 249, 256-257 (2007). The relevant question for Fourth Amendment purposes is therefore whether that continued detention is reasonable, not whether the police would be permitted to initiate the same seizure, absent the underlying probable cause of a traffic offense, against a hypothetical person who has not committed any violation.

2. Petitioner also argues (Br. 21-23) that without a bright-line rule forbidding all post-ticket dog sniffs, it would be too difficult for courts to determine whether a given dog sniff is reasonable. But the lower courts have already been doing just that. Several courts have employed the reasonableness standard to evaluate a post-ticket dog sniff, and they have readily been able to assess the length of the delay, the total duration of the stop, and the officer's diligence. See pp. 36-37, *supra*. In addition, the numerous decisions considering dog sniffs and other unrelated inquiries performed before the ticket is issued confirm that courts have been able to evaluate the reasonableness of a stop prolonged by such inquiries. See pp. 27-29, *supra*.

Petitioner's assertion (Br. 22) (citation omitted) that any judicial assessment of a post-ticket dog sniff would be "virtually standardless" wrongly assumes

that the inquiry would focus on the length of the sniff-related delay in isolation and whether that amount of time could be characterized in the abstract as "de minimis." But that is not the test; rather, the question is whether the stop was unreasonably prolonged in light of its traffic-related purpose.[24] See *Caballes*, 543 U.S. at 407; *Griffin*, 696 F.3d at 1362 (rejecting focus on the "interval of prolongation in isolation") (citation omitted). That standard adequately guides courts' analysis, as the decisions applying the unreasonable-prolongation analysis demonstrate. And although the standard requires consideration of the specific circumstances of each case, that is already true of judicial consideration of routine stops not involving dog sniffs. See pp. 15-17, *supra*. Courts, moreover, will be able to draw guidance from decisions involving similar scenarios. See *Ornelas* v. *United States*, 517 U.S. 690, 698 (1996).

3. Finally, petitioner emphasizes the "embarrassing" and "intrusive" nature of dog sniffs and argues that permitting post-ticket dog sniffs will subject innocent drivers to "false alerts" and needless searches of their vehicles. Pet. Br. 27-28. As this Court has repeatedly held, however, a dog sniff is not a search requiring independent Fourth Amendment justification. See *Caballes*, 543 U.S. at 408-409; *Place*, 462 U.S. at 707. Accordingly, after *Caballes*, it is settled

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[24] The Eighth Circuit used the term "*de minimis*" in *$404,905.00 in U.S. Currency*, 182 F.3d at 649, as shorthand to describe the minimal nature of the delay in relation to the circumstances of the stop as a whole. The court considered whether the post-ticket delay was "reasonable[] measured by the totality of the circumstances," rather than focusing on the length of the delay in isolation. *Ibid.*

law that police officers may conduct dog sniffs without reasonable suspicion during otherwise lawful traffic stops. A bright-line rule prohibiting post-ticket dog sniffs, while permitting sniffs that are performed during the course of the stop, cannot reasonably be based on views about the intrusiveness of dog sniffs.

Petitioner also asserts (Br. 28), citing a Chicago Tribune study, that dog sniffs conducted without suspicion subject motorists to needless searches because often no drugs are found following a canine alert. But in *Florida* v. *Harris*, 133 S. Ct. 1050 (2013), which concerned the reliability of dog sniffs in establishing probable cause, the defendant unsuccessfully relied on that same study. See Resp. Br. at 29-30 (No. 11-817). This Court rejected the argument that canine alerts that do not result in discovery of narcotics indicate unreliability. 133 S. Ct. at 1056 & n.2. (defendant's arguments "reflect[ed] a misunderstanding" because dogs often properly alert to residual odors). In any event, petitioner disclaimed any challenge to the dog's reliability in this case. J.A. 30.

F. The Dog Sniff Did Not Unreasonably Prolong The Traffic Stop In This Case

Officer Struble's conduct of the dog sniff in this case did not unreasonably prolong the stop of petitioner's vehicle. The stop lasted approximately 29 minutes in total, which is within the standard range of traffic stops involving similar circumstances. Officer Struble made the traffic stop alone and encountered two persons in the car, increasing the amount of time it took to assess the situation and run serial warrant

checks on petitioner and his passenger, Pollman.[25] The total duration of the stop, therefore, did not exceed what petitioner might reasonably have expected based on his traffic violation and the circumstances.

Officer Struble spent the first 21-22 minutes of the stop conducting permissible inquiries designed to investigate the traffic violation: he verified petitioner's license and registration, ran warrant checks on petitioner and Pollman, questioned petitioner about the traffic violation and his reasons for being on the road, prepared a written warning, and explained the warning to petitioner. J.A. 22-23, 58, 100. As the magistrate judge found, the amount of time Struble took to investigate the violation and issue the ticket was not "an inordinately large amount of time." J.A. 100. Indeed, some of that time was attributable to petitioner's actions: he apparently lied about the reason he had driven onto the shoulder, J.A. 46, and he got out of his car but refused to accompany Officer Struble to the patrol car, J.A. 23. Both of those actions necessitated further conversation. Officer Struble was thus reasonably diligent in performing the tasks related to the traffic stop: he proceeded directly from one to the next, and petitioner has never sug-

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[25] See *United States* v. *Kitchell*, 653 F.3d 1206, 1218 (10th Cir.) (22-minute stop justified by need to question three occupants), cert. denied, 132 S. Ct. 435 (2011); *United States* v. *Parker*, 512 Fed. Appx. 991, 993 (11th Cir. 2013) (per curiam) (stop lasting 30-40 minutes was reasonable where officer needed to locate relevant statute); *Branch*, 537 F.3d at 338 (bulk of 30-minute stop was justified by normal incidents of traffic stop, and "relatively small" portion was justified by reasonable suspicion); *United States* v. *Mincey*, 321 Fed. Appx. 233, 241-242 (4th Cir. 2008) (35-minute stop was reasonable because rental-car verification took extra time), cert. denied, 558 U.S. 945 (2009).

gested that Officer Struble failed to perform any of his tasks expeditiously under the circumstances.

Officer Struble was also reasonably diligent with respect to the dog sniff. He testified that for officer-safety reasons, he had to call for backup before performing the dog sniff. J.A. 72. The practice of conducting a sniff only with a backup officer present is well-accepted, see p. 23, *supra*, and it was particularly appropriate in this case, as the officer was outnumbered by petitioner and Pollman. See *Mimms*, 434 U.S. at 111 (recognizing important interest in officer safety during traffic stops). Struble did not wait until he issued the written warning to call for backup, instead placing the call some eight minutes before that, while he was conducting a criminal-record check on Pollman. J.A. 27. Within two minutes after Struble made the call, the backup officer was en route. *Ibid.* Struble finished explaining the citation at 12:27 or 12:28 a.m., and the backup officer arrived at 12:33 a.m. Struble immediately retrieved his dog, and it alerted around 12:35 a.m. J.A. 68-69. The delay attributable to the dog sniff is thus seven to eight minutes. J.A. 33, 100 (magistrate judge's finding). Throughout, Struble appears to have attempted to minimize the delay.[26]

The delay of seven to eight minutes in the context of a 29- or 30-minute stop did not unreasonably prolong the stop. Once petitioner had been detained for 22 minutes in connection with the traffic violation, the additional delay was incremental: it did not represent

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[26] Cf. *State* v. *Beckman*, 305 P.3d 912, 917-918 (Nev. 2013) (en banc) (nine-minute delay that doubled stop's duration was unreasonable where officer did not seek dog sniff until well after stop concluded, which the court viewed "seiz[ing]" the defendant "again").

the bulk of the total time, or even one-half or one-third of it. That indicates that Officer Struble's overall course of conduct was primarily focused on resolving the traffic stop. See *Everett*, 601 F.3d at 495. The seven- or eight-minute interval, moreover, did not extend the traffic stop beyond what might reasonably be required for similar traffic stops not involving dog sniffs.

II. THE DOG SNIFF OF PETITIONER'S CAR WAS INDEPENDENTLY JUSTIFIED BY THE OFFICER'S REASONABLE SUSPICION OF CRIMINAL ACTIVITY

The extension of petitioner's traffic stop to conduct a dog sniff was independently justified by Officer Struble's reasonable suspicion—unrelated to petitioner's traffic offense—that unlawful activity was taking place. An officer may prolong a traffic stop if "the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot." *United States* v. *Chavez Loya*, 528 F.3d 546, 553 (8th Cir. 2008). Although the court of appeals did not rule on that ground, a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see Gov't C.A. Br. 15-19.[27]

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[27] The magistrate judge made an oral finding that reasonable suspicion did not justify extending the detention after the written warning was issued. J.A. 102. The judge did not engage in an extended analysis, however. Neither the district court nor the court of appeals addressed the issue.

Reasonable suspicion requires "a particularized and objective basis for suspecting legal wrongdoing," but "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States* v. *Arvizu*, 534 U.S. 266, 273-274 (2002) (citation and internal quotation marks omitted). The existence of reasonable suspicion is subject to de novo appellate review, giving "due weight to inferences drawn from [the historical] facts by resident judges and local law enforcement officers."[28] *Ornelas*, 517 U.S. at 699.

Officer Struble reasonably suspected that petitioner's car contained illicit drugs. Numerous factors, taken together, established reasonable suspicion: the overwhelming odor of air freshener emanating from petitioner's car, petitioner's evident agitation, petitioner's implausible explanation for his traffic violation; Pollman's nervous behavior and attempts to avoid being looked at closely, and Officer Struble's belief that Pollman's story about the reason for making the long trip to Omaha in the middle of the night

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[28] Petitioner is incorrect (Br. 34) that the magistrate judge declined to credit Officer Struble's testimony that he found particular circumstances to be suspicious. The judge stated in his oral ruling that "[o]ne can take difference with some of these conclusions as to what [Struble's] suspicious of * * * and I do, as well as [defense counsel], have some doubts about the fact that he has these suspicions but whether they're of any value." J.A. 95. Given that petitioner's counsel did not argue that Struble's testimony should not be credited, but only that the circumstances were not legally sufficient to create reasonable suspicion, the judge's statement should be understood to express the legal conclusion that reasonable suspicion was absent.

was not credible.[29] Moreover, immediately after petitioner declined to consent to a dog sniff of his car and Officer Struble asked him to step out of his vehicle to await the arrival of the backup officer, petitioner rolled up the windows of his car, further contributing to Struble's reasonable suspicion that the air fresheners were being used to mask the odors detectable to a drug dog. Together, these circumstances are more than sufficient to create reasonable suspicion.

Petitioner's argument to the contrary (Br. 34-39) is premised on the assertion that each factor, in isolation, might be perfectly innocent. But this Court has held that it is not appropriate to "evaluat[e] and reject[] * * * [the] factors in isolation from each other" on the ground that each is "susceptible to an innocent explanation." *Arvizu*, 534 U.S. at 274. Rather, courts must "take into account the 'totality of the circumstances.'" *Ibid.* Here the totality of the circumstances strongly suggested that petitioner was engaged in criminal activity.

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[29] See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion."); *Branch*, 537 F.3d at 338 (explaining that nervousness of driver, passenger's refusal to make eye contact, and "presence of several air fresheners" in car contributed to reasonable suspicion of illicit drug activity); *United States* v. *Fuse*, 391 F.3d 924, 929-930 (8th Cir. 2004) (holding that "a strong odor of air freshener" helped "demonstrate reasonable suspicion justifying continued detention of [defendant] to conduct a dog sniff"), cert. denied, 544 U.S. 990 (2005); see also *United States* v. *Riley*, 684 F.3d 758, 764 (8th Cir.) ("[R]easonable suspicion could derive from 'unusual or suspicious travel plans.'" (quoting *United States* v. *Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998))), cert. denied, 133 S. Ct. 800 (2012).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

No. 13-9972

IN THE

Supreme Court of the United States

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

Contrary to the government's rhetoric, Mr. Rodriguez does not ask the Court to abandon the Fourth Amendment touchstone of "reasonableness." He simply asks the Court to enforce the constitutional lines this Court has already recognized. It is the government that offers a radical reinterpretation of the law.

According to the government, a lawful traffic stop starts with a "reasonable" amount of time—a standard to be defined on a case-by-case basis but at least enough time to also allow for a dog sniff. During that "reasonable" period the officer has carte blanche to investigate the traffic stop and any other matter that comes to mind, even if those investigatory activities extend the stop after all the activities needed to dispose of the traffic infraction have been completed. In reality, the government's "reasonableness" standard is no standard at all.

Nothing in this Court's jurisprudence supports the government's attempt to turn a traffic stop into a "general warrant" for investigation. A bright-line rule for "reasonableness" of a traffic stop, in which the justification for the detention expires when the officer has completed the tasks related to the purpose of the stop, will reaffirm the constitutional boundaries that this Court has already established, provide needed guidance to police, and safeguard individual liberties.

I. THE GOVERNMENT'S CONCEPT OF A TRAFFIC STOP AS A GENERALIZED INVESTIGATORY STOP IS ANTITHETICAL TO THE BRIEF INTRUSION, LIMITED BY ITS TRAFFIC-RELATED PURPOSE, THAT THIS COURT HAS AUTHORIZED WHEN A MOTORIST COMMITS A TRAFFIC VIOLATION.

The government's defense of the Eighth Circuit's judgment depends on a basic premise: that the traffic stop of Mr. Rodriguez had not yet concluded when Officer Struble ordered him to stay for a dog sniff even though the officer had completed all of the tasks necessary to address Mr. Rodriguez's traffic offense. The stop was not over, the government argues, because Officer Struble had not yet completed the checklist of activities that courts have at one time or another permitted an officer to undertake during a traffic investigation. Resp't Br. 12-15.

According to the government, an officer's observation of a traffic infraction gives her free rein to conduct a host of "investigatory activities," both related and unrelated to the traffic offense, including a dog sniff. Resp't Br. 12. Addressing the traffic violation must fall somewhere on the officer's list of tasks. However, because the stop is "not strictly cabined by [its] traffic justification," Resp't Br. 30, it need not be the officer's primary concern. "[T]he order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing." *Id.* In the government's view, a traffic stop is limited only by the investigative tools the officer has at her disposal, or can easily summon, and by a "reasonable" amount of time—a standard which remains amorphous but

could easily be "40 minutes or more." Resp't Br. 12, 16, 30, 38.

This argument is question-begging and circular. It simply assumes the truth of the crucial premise in the government's argument; namely, that a "reasonable period" for a traffic stop must include the time it takes to complete whatever other investigatory efforts an officer cares to undertake, including dog sniffs. And thus, to complete the circle, additional time to conduct a dog sniff is reasonable because it is reasonable to take the time to conduct one in the first instance. It is no wonder that the government takes such a position. If an officer is entitled to a "reasonable" amount of time to complete "traffic-stop tasks," Resp't Br. 30, and one of those tasks is a dog sniff, the government will nearly always win the argument on "reasonableness" when contraband is found, especially given the myriad conceivable rationales for delay.

The government's position is not only logically flawed, it is inconsistent with this Court's precedent. A traffic stop based solely on a traffic infraction is not a generalized crime investigation but merely a brief and limited encounter "more analogous to a so-called *Terry* stop." *Berkemer* v. *McCarty,* 468 U.S. 420, 439 (1984) (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Its permissible duration is dependent on its "mission"—to investigate and address the traffic violation that prompted the stop. *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005). *Terry*'s guiding principles require the police to "'diligently pursue'" that purpose. *United States* v. *Sharpe*, 470 U.S. 675, 684-85 (1985) (internal citation omitted).

Because the reasonableness of a traffic stop depends on whether an officer diligently addressed the traffic violation, the order of activities conducted during the stop absolutely *does* matter. An officer is not

"diligently pursuing" the traffic violation unless she promptly devotes her time to the tasks related to the violation. And when that purpose has been addressed, as it was in this case, she is no longer "diligently pursuing" the reason for the stop if she further detains the motorist. *Sharpe*, 470 U.S. at 685; *Caballes*, 543 U.S. at 407. Instead, she is engaging in a separate investigation that requires its own justification.

That the Court in *Caballes* and *Arizona v. Johnson*, 555 U.S. 323 (2009), allowed officers to undertake activities unrelated to the traffic violations in those cases does not mean that an officer's authority to detain a motorist is not "strictly cabined by the traffic justification for the stop." Resp't Br. 30. The question whether, or by how much, a stop may be extended for unrelated activities, was not squarely at issue in *Caballes* or *Johnson*, as the intrusions in those cases occurred while an officer was still addressing the traffic violation. *Caballes*, 543 U.S. at 408 ("[T]he duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."); *Johnson*, 555 U.S. 323 ("Nothing had occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended . . . ."). However, nothing the Court *did* say suggests that the stop's traffic-related limits on duration are no longer applicable. To the contrary, *Caballes* and *Johnson* reaffirmed those limits.

The government repeatedly mischaracterizes *Caballes*, claiming that the Court held that a dog sniff is permissible so long as it does not "unreasonably prolong" a traffic stop. Resp't Br. 8, 12-13, 19-22, 36. But that is not what *Caballes* said. The "narrow" holding in *Caballes* is that the Fourth Amendment does not require reasonable suspicion to justify using

a drug-detection dog "*during* a legitimate traffic stop." *Caballes*, 543 U.S. at 407 (emphasis added) (internal quotation marks omitted) (emphasizing the "narrow" question presented). The Court defined the temporal boundaries of a "legitimate traffic stop" as the time "reasonably required to complete [the] mission [of addressing the traffic violation]." *Id.* It used the words "unreasonably prolonged" to describe an example of an unconstitutional seizure during which a dog sniff would *not* be permitted. *Id.* at 407-08 (citing *People* v. *Cox*, 782 N.E.2d 275, 280 (Ill. 2002) (overruled on other grounds)). But that is quite different from holding that a dog sniff is always permissible if it does not "unreasonably prolong" the stop. Resp't Br. 8, 12-13, 19-22, 36. It does not come close to endorsing the government's overarching position that even an extensive prolongation of a stop could be justified for a dog sniff so long as prosecutors were able to offer some objective factor for the delay, such as the distance of a K-9 Unit in a rural area or the late hour of the traffic stop.

Johnson reinforced the traffic-related boundaries set forth in *Caballes*, stating that, in a traffic stop setting, the "first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants *pending inquiry into a vehicular violation*." *Johnson*, 555 U.S. at 327 (emphasis added). When *Johnson* later described a "lawful roadside stop," it married that term and its permissible duration to the "investigation of a traffic violation." *Id.* at 333.

In addition to reaffirming a traffic stop's underlying traffic justification, the Court in *Caballes* and *Johnson* described the activities in question as ancillary to, rather than an intrinsic part of, the stop justified by the traffic violation. In *Caballes*, the Court

acknowledged that a dog sniff is an activity separate from "the traffic offense and the ordinary inquiries incident to [that offense]," but held it does not require independent justification when those traffic-related inquiries are still ongoing and the traffic-related "mission" has not yet been accomplished. *Caballes*, 543 U.S. at 407-08. In *Johnson*, the Court held that mere questioning into matters "unrelated to the justification for the traffic stop" does not change the stop's basic character provided the traffic investigation is still in progress and the unrelated questions do not "measurably extend" it. *Johnson*, 555 U.S. at 333. At no time did this Court consider either of these activities part and parcel of a routine traffic stop, such that the stop is not truly "over" until the officer has checked these items off her list of investigatory activities. If they were, it would make no difference if they "measurably extend[ed]" its duration or not. *Id.*

Because an officer's authority to detain for a traffic violation *is* "strictly cabined by the traffic justification," Resp't Br. 30, her right to hold a driver expires when that violation has been resolved. That is why the "overall objective reasonableness" inquiry that the government urges this Court to adopt, Resp't Br. 20, should not include any circumstances that occur *after* the traffic violation has been addressed. Once the traffic investigation that provided cause for the stop is resolved, the additional detention of the driver for further investigation is actually a second seizure—as here, where Officer Struble ordered Mr. Rodriguez to stand and wait at the front of the car until backup arrived. See *Muehler* v. *Mena*, 544 U.S. 93, 101 (2005) (additional seizure would have occurred had unrelated questioning prolonged the detention of a woman who was initially lawfully detained during a search conducted under a search warrant). Individu-

alized suspicion is required in order for that seizure to be "reasonable." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000).

For these same reasons, the government's hypothetical stops miss the point. The government asserts that the individual interest at stake in this case is "the interest in avoiding an unreasonably long detention," Resp't Br. 9, and therefore varies its hypotheticals by the order in which the officer undertakes certain tasks rather than by the length of the stop. Resp't Br. 21, 25, 30, 32.[1] "From the individual's perspective," the government asserts, "each stop involves exactly the same intrusion, in character and degree." Resp't Br. 32.

But the government misapprehends the nature of the interest at stake. In the case of a detention after the traffic investigation has concluded, the interest at stake is not merely an interest in avoiding an unreasonably long detention. It is the fundamental interest in not being detained *at all*, on an entirely separate matter, in the absence of individualized suspicion. This interest was the very reason behind the Fourth Amendment. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083-84 (2011) ("The Fourth Amendment was a

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[1]The government's hypothetical stops all last between ten and fifteen minutes. Resp't Br. 21, 25, 32. The limited studies that have been conducted on the length of traffic stops show that such times are close to the average. See Ill. Dep't of Transp., *Illinois Traffic Stop Study 2013 Annual Report* 6-7 & Figure 6 (Alexander Weiss Consulting ed., 2013), *available at* http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2013/2013%20ITSS%20Executive%20Summary.pdf (median length of a traffic stop in Illinois is ten minutes). Having posited these hypotheticals as stops the Court should consider "reasonable," it is disingenuous for the government to assert that a stop of "40 minutes or more" should not raise an eyebrow. Resp't Br. 38.

response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown."). From the individual's perspective, that interest is different in both character and degree from the interest in the amount of time it may take for an officer to address the traffic violation. "A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, [and] that he may then be given a citation . . . ." *Berkemer*, 468 U.S. at 437; see also *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) (traffic stops are a "brief" and "limited" encounter). A motorist does not expect an officer to continue to detain him for a separate investigation after the purported reason for the stop has been addressed. *Berkemer*, 468 U.S. at 437. The government's hypotheticals therefore fail to account for critical expectations that go beyond the amount of time that individuals are required to expend.

II. THE GOVERNMENT'S CONCEPT OF A TRAFFIC STOP IS INCOMPATIBLE WITH THE FOURTH AMENDMENT'S FUNDAMENTAL PURPOSE OF LIMITING OFFICER DISCRETION.

The Framers implemented the Fourth Amendment's safeguards to ensure that individual liberties would not be "'subject to the discretion of the official in the field.'" *Prouse*, 440 U.S. at 655 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)). To that end, the Fourth Amendment's tests of "reasonableness" require that an intrusion be "capable of measurement against 'an objective stand-

ard.'" *Prouse*, 440 U.S. at 654 (quoting *Terry*, 392 U.S. at 21).

Despite these bedrock principles, the government offers a vision of a traffic stop in which an officer has a significant amount of time (at least up to 40 minutes) and unfettered discretion to investigate the motorist she stops. Resp't Br. 12. The government suggests that a "reasonableness" standard will adequately define the limits of that discretion. Resp't Br. 20, 37-38. But because the government's version of a traffic stop is no longer tethered to its traffic-related purpose, there are no objective standards against which "reasonableness" may be measured. In other words, the government's test of "reasonableness" is no test at all. It places individual constitutional liberties solely "in the hands of every petty officer," *Boyd* v. *United States*, 116 U.S. 616, 625 (1886)—the very outcome the Framers wished to avoid.

This conflict with fundamental Fourth Amendment purposes is reason enough to reject the government's position. But there are policy implications to affording broad discretion, as well. Traffic stops have "human consequences—including those for communities and for their relationships with the police." *Heien* v. *North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting). As the most common form of interaction between citizens and police, they play a substantial role in shaping citizens' perceptions of the legitimacy of police conduct. Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and Public, 2008* 1 (2011);[2] see also Seth W. Stoughten, *The Incidental Regulation of Policing*, 98 Minn. L. Rev. 2179, 2187-88 (June 2014) ("Community attitudes about . . . the

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[2]*Available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf.

legitimacy of both law and government depend heavily on perceptions that are shaped by the interactions that civilians have with police officers . . . .").

Studies show that most drivers pulled over for a traffic violation believe that the police had a legitimate reason for stopping them. Eith & Durose, *supra*, at 8 (in 2008 study of traffic stops, 84.5 percent of drivers felt they had been stopped for a legitimate reason). When discretionary conduct like a search is added to the equation, however, the perception of legitimacy dramatically decreases. *Id.* at 11. In cases in which a search of a vehicle was conducted during a traffic stop, 79.3 percent of motorists believed that the search was *not* legitimate, even though 60 percent of those searches were conducted with driver consent. *Id.* at 10, 11 & Table 15. Minority drivers are more likely to be ticketed, searched, and arrested during a traffic stop, and therefore bear the brunt of an officer's discretionary decisions. *Id.* at 9-10. Concerns that police are acting on improper motives are correspondingly higher in minority communities. Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 Soc. Probs. 305, 314-16 & Table 1 (2004).

This Court held in *Whren* v. *United States*, 517 U.S. 806, 810-12 (1996), that an officer's subjective motivations do not render a traffic stop unlawful when the officer has probable cause to believe a traffic violation has occurred. But the Court did not suggest that improper motives were not a concern, only that it was preferable to measure the legality of a traffic stop against the objective standard of probable cause rather than attempt to discern whether a "reasonable officer" would have been motivated to stop the car. *Id.* at 813. If this Court accepts the government's invitation to expand a traffic stop beyond its traffic-

investigation purposes, any objective standard for gauging the reasonableness of a stop's execution will be exceedingly difficult to discern and enforce. This Court's precedent counsels against such an approach. *Prouse*, 440 U.S. at 654. As Professor LaFave explains: "Since the Court [has] concluded that detecting pretext on a case-by-case basis [i]s not worth the candle, this is all the more reason for ensuring that the procedures permitted incident to traffic stops are limited to those needed for traffic enforcement . . . ." Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1871 (Aug. 2004).

III. A BRIGHT-LINE RULE PROHIBITING SUSPICIONLESS DETENTIONS AFTER A TRAFFIC INVESTIGATION IS COMPLETE AFFORDS AMPLE FLEXIBILITY TO OFFICERS IN THE FIELD AND POSES NO DIFFICULTY TO THE COURTS ENFORCING IT.

The government and its *amici* predict that a bright-line rule will lead to a host of adverse consequences. They argue that the rule deprives officers of flexibility, and that a solo officer in particular will find it difficult to complete a dog sniff (or other unrelated activities) while also addressing the reason for the traffic stop. Resp't Br. 22, 25; Resp't Amici Br. 12-13. *Amici* desire a stop open-ended enough to take into account geography and population density, as solo officers often require backup to safely conduct a dog sniff and, in many localities, backup "may simply need time to arrive." Resp't Amici Br. 22.

What the government and its *amici* ignore is that a stop justified by a driver's traffic violation authorizes a traffic investigation, not a drug investigation.

Whren, 517 U.S. at 810; see also *Berkemer*, 468 U.S. at 437-38 (emphasizing limited nature of a traffic investigation). Mr. Rodriguez's bright-line rule would not in any way hinder an officer's ability to address the traffic-related purpose of the stop, which is the only reason the Constitution allows the motorist to be stopped in the first place. The "while I have you here" investigation that the government and its *amici* seek may advance an interest in general crime control, but that is not an interest the Constitution can accommodate in the absence of individualized suspicion. *Edmond*, 531 U.S. at 43-44. "The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

Amici's request for a traffic stop long enough to account for geography, population density, and local police practice is particularly insupportable. Fourth Amendment rights cannot vary "from place to place and from time to time." *Whren*, 517 U.S. at 815. The Fourth Amendment rights of a motorist in Valley, Nebraska must be the same as the rights of a motorist in urban St. Louis. Because a dog sniff is not an integral part of a traffic stop, those rights should not depend on whether the motorist is stopped by a single officer or by officers working in tandem, on the size of the local police force, or on the number and location of dogs to which the officers are afforded access. And while officer safety is never to be trivialized, there is a simple solution for the officer who must go forward with a traffic stop without a dog or a backup officer: attend quickly to the business of the traffic violation and then allow the driver to be on her way. Literally millions of traffic stops are conducted in this manner each year. See Eith & Durose, *supra*, at 7.

Contrary to the government's and its *amici*'s assertion, drawing a constitutional line at the point that an officer has completed the traffic investigation does not deprive officers of the ability to respond to situations that arise during a traffic stop. Resp't Br. 35; Resp't Amici Br. 20. Officers may still act on exigent circumstances, individualized suspicion, and consent. The police are deprived only of a rule that allows them to use a dog 100 percent of the time within whatever time they can convince a court is "reasonable." Because there is no dog sniff exception to the Fourth Amendment and no basis for creating one, that rule is not one to which they are entitled.

The government's *amici* warn of adverse consequences for the courts, as well. They assert that courts will struggle to apply the bright-line rule because it is "difficult to isolate" when a traffic investigation is complete. Resp't Amici Br. 12. But reason and experience say otherwise. As Professor LaFave explains, "[t]he bare essentials of a 'routine traffic stop' consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning." 4 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 507 (5th ed. 2012). Applying this criteria, lower courts have proved more than capable of identifying when an investigation into a traffic violation has concluded. See, *e.g.*, *United States* v. *DeJesus*, 435 F. App'x 895, 900 (11th Cir. 2011) ("'[W]hen a citation or warning has been issued and all record checks have been completed and come back clean, the legitimate investigative purpose of the traffic stop is fulfilled.'") (citation omitted); *United States* v. *Branch*, 537 F.3d 328, 336 (4th Cir. 2008) ("[O]nce the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has

issued the requisite warning or ticket, the driver 'must be allowed to proceed on his way.'") (citation omitted); see also Pet'r Br. 18 (listing cases discussing the moment a traffic stop ends and a post-stop "consensual encounter" begins). Courts are also prepared for situations in which an officer delays issuing a ticket while pursuing an unrelated investigation. See *United States* v. *Santiago*, 310 F.3d 336, 341-42 (5th Cir. 2002) (motorist was unlawfully detained after officer had completed computer checks, confirmed that the vehicle was not stolen, and satisfied himself the driver was authorized to drive, even though officer had not issued a ticket or returned the driver's documents); *United States* v. *Bell*, 555 F.3d 535, 541 (6th Cir. 2009) ("[T]he fact that the warning was never actually completed is not determinative: A stop may be unlawfully extended beyond the initial purpose even if the officer never formally completes the citation."). Thus, any concern that a bright-line rule would be difficult for courts to apply is unfounded.

As for *amici*'s related concerns of increased litigation, Resp't Amici Br. 13-14, these concerns are misdirected. The government would have the courts determine the "reasonableness" of a stop "in light of all the circumstances" while detaching the duration of the stop from its underlying traffic justification and opening it up to all manner of "investigatory inquiries." Resp't Br. 12, 26-30, 36. This test is a recipe for increased litigation, even if the deck is decidedly stacked in the government's favor. Compared to the government's approach, a bright-line rule that preserves the stop's traffic-related purpose will actually reduce the "complex hindsight analysis" that *amici* hopes to avoid. Resp't Amicus Br. 13.

IV. EVEN UNDER THE GOVERNMENT'S TEST, THE DOG SNIFF EXTENDED THE TRAFFIC STOP BEYOND THE BOUNDS OF "REASONABLENESS."

The government's "overall reasonableness" test would have the courts consider "the duration of the stop [including the time after the purpose of the stop was resolved], the length of the dog sniff, and the officer's diligence" to determine whether the officer "unreasonably prolonged" the traffic stop. Resp't Br. 37. It would require courts to "[e]valuat[e] the total length of the stop in question against the range of ordinary traffic stops"[3] and determine "the proportion of the total stop that represents the delay attributable to the dog sniff (or other unrelated inquiry)." Resp't Br. 38. Even if the Court adopts this test, the detention in this case was unreasonable.

The overall "stop" under the government's test lasted 29 minutes. The government argues that this time falls within the "range of ordinary traffic stops," which it claims is anywhere from "several minutes to 40 minutes or more." Resp't Br. 38. As support for its contention that an "ordinary" traffic stop can be 40 minutes, however, the government directs the Court to LaFave's treatise on *Search and Seizure*. Resp't Br. 16, 38 (citing 4 Wayne R. LaFave, *Search and*

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[3]The government also suggests it would be preferable to compare the stop to "stops involving similar underlying circumstances." Resp't Br. 37. But it does not explain how a court would go about identifying those stops. The only people with sufficient incentive to challenge the length of a traffic stop are people in whose vehicle contraband was found, and each case will be different in all but the most basic aspects. Thus, the range of cases to which the court may look for "similar circumstances" will be narrow and add no objective value to the task the government expects the court to undertake.

Seizure § 9.3(c), at 508-09 & n.155, 512 n.170). The 40-minute case referenced in LaFave was not "ordinary" but an outlier. In that case, *United States* v. *Barragan*, 379 F.3d 524, 529 (8th Cir. 2004), routine computer checks took 40 minutes because the vehicle was registered in a state other than where it was purchased, making the registration harder to verify. Because the delay in that case was "longer than normal," *id.*, it should not be used to establish the time it takes to conduct an "ordinary" traffic stop.[4] Studies like the Illinois Traffic Stop Study, *supra* note 2, which track the duration of *all* traffic stops, including those of millions of innocent motorists, are a far better gauge of the "range of ordinary traffic stops." Judged against this standard (and against the government's own hypotheticals), Mr. Rodriguez's stop was nearly three times the length of an average stop. See Ill. Dep't of Transp., *supra* note 2, at 6-7 & Figure 6 (median length of a traffic stop in Illinois is ten minutes).

The time attributable to the dog sniff was approximately eight minutes, which represents about 27 percent of the overall stop by the government's measure. However, under the government's test, a court must consider all of the time spent on activities unrelated to the traffic stop. Resp't Br. 41. Officer Struble initiated the stop at 12:06 a.m. and concluded his questioning at 12:19 a.m., when he went back to his car to run Mr. Pollman's driver's license, call for backup, and write out the warning ticket. J.A. 26-27. Officer Struble's exchange with Mr. Rodriguez consisted of requesting his driver's license and registration, asking him why his passenger-side tires had crossed the

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[4]Indeed, because the cases cited in LaFave are strictly those of people in whose vehicle contraband was found, they are universally a poor representation of what is "ordinary."

fog line, informing him that crossing the line was a traffic violation, and asking him to sit in the patrol car. J.A. 22-23. The refusal of that request necessitated a brief acknowledgment that Mr. Rodriguez was not required to do so, at which time Mr. Rodriguez replied that he preferred to stay in his own vehicle. J.A. 23.

Officer Struble's interaction with the passenger, on the other hand, focused on Mr. Rodriguez's and Mr. Pollman's interest in purchasing a vintage Mustang, the price that the seller was asking for it, whether they had looked at pictures of the car before driving to Omaha, the fact that the seller did not have the title, and their resulting decision against buying the car. J.A. 24-26, 60-61. This discussion was wholly unrelated to Mr. Rodriguez's traffic violation of driving on the shoulder. It was not information that was "reasonably required" to address that violation and can only be described as a fishing expedition to develop a reason to hold the men longer.

Even estimating, conservatively, that only half of the thirteen minutes of questioning was about a vintage car, that brings the non-traffic-related activities up to close to half of the entire encounter. Although the government's reasonableness mark is a moving target, even the government seems to believe that such a delay would be significant, as it states that the "additional delay" in this case "did not represent the bulk of the total time, or even one-half or one-third of it." Resp't Br. 44-45.[5] When one half of a stop is devoted to activities that are not "reasonably required"

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[5]As an example of unreasonable delay, the government also cites *Wells* v. *State*, 922 N.E.2d 697, 700 (Ind. Ct. App. 2010), in which the delay attributable to the dog sniff "doubl[ed] the length of the stop." Resp't Br. 39.

to resolve the traffic violation,[6] that traffic stop fails even the government's test for reasonableness.

V. THE SEIZURE FOR A DOG SNIFF WAS NOT JUSTIFIED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

The government asserts that the stop is independently supported by reasonable suspicion of criminal activity. Resp't Br. 45-47. But it fails to address contrary evidence in the record, including the Magistrate Judge's factual findings.

The government claims that the odor of air freshener was "overwhelming." Resp't Br. 46. But Officer Struble also said it was pleasant, and no objective evidence, such as the presence of several air fresheners, supports the claim. J.A. 20, 51. The government finds it suspicious that Mr. Rodriguez was agitated and gave an "implausible explanation" for his traffic violation,[7] which the government describes as "driv[ing] for several seconds on the shoulder of the road." Resp't Br. 2, 46. When one considers that "several seconds" of driving "on the shoulder of the road" was merely Mr. Rodriguez's passenger-side tires crossing the fog line for one to two seconds, J.A. 30, 46, agitation is to be expected, as is the desire to avoid a ticket for such a minor infraction. The government describes Mr. Pollman as "attempt[ing] to avoid being looked at closely," Resp't Br. 46, but skips over the fact that he was literally stuck in the middle while Officer Struble and Mr. Rodriguez talked across him about the traffic violation. Moreover, when Of-

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[6] *Caballes*, 543 U.S. at 407.

[7] Whether Mr. Rodriguez's explanation that he was avoiding a pothole is "implausible" is a matter of opinion, as neither side attempted to prove or disprove the existence of the pothole.

ficer Struble spoke to Mr. Pollman directly, Officer Struble did not note any signs of nervousness.

The government argues that Officer Struble had every reason to question Mr. Pollman's story about "the reason for making the long trip to Omaha in the middle of the night." Resp't Br. 46. But it has no answer for the fact that this "long trip . . . in the middle of the night" is a trip entirely of Officer Struble's creation, as he did not ask when the men had started their journey to Omaha or how long they had been there before driving back home.

Finally, the government asks the court to consider the fact that, after Officer Struble "asked [Mr. Rodriguez] to step out of his vehicle to await the arrival of the backup officer,"—an extremely generous characterization of Officer Struble's response to Mr. Rodriguez's refusal to consent to a dog sniff—Mr. Rodriguez rolled up his car windows. Resp't Br. 47. But this factor has no place in the reasonable suspicion analysis, as the order to exit the vehicle came after the traffic-related tasks were complete. By the time Mr. Rodriguez was ordered out of the vehicle, independent justification was already required. Reasonable suspicion must be based on the facts known to the officer at the time of the seizure in question, not on facts that come to light after the seizure is initiated. See *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("The principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop . . . ."); *Terry*, 392 U.S. at 21-22 (reasonable suspicion analysis requires an assessment of "facts available to the officer at the moment of the seizure or the search").

The holes in the government's argument are the same ones that led the Magistrate Judge and district court to conclude that the seizure for the dog sniff

was not supported by reasonable suspicion. J.A. 95, 103-04, 115. This conclusion was based on Magistrate Judge Gossett's factual finding that Officer Struble was not credible with respect to the facts he gave for suspecting criminal activity.[8] J.A. 95, 103-04. After hearing the testimony and observing Officer Struble's demeanor, Judge Gossett found him credible only as to "the issues that really make a difference," J.A. 102, which the judge identified as: 1) the initial justification for the stop; 2) the duration of the stop; and 3) the time it took for the officer to conduct a dog sniff, compared to other traffic stop extensions that the Eighth Circuit had found to be "*de minimis*." J.A. 98-109. With respect to the facts relating to reasonable suspicion, Judge Gossett found that Officer Struble was not credible. J.A. 95, 102. "One can take difference with some of these conclusions as to what he's suspicious of and what he's not suspicious of, and I do, as well as [defense counsel], have some doubts about the fact that he has these suspicions . . . ." J.A. 95. Summing up his findings on reasonable suspicion, Judge Gossett said that all that Officer Struble had was "just a lot of things and a big hunch." J.A. 104.

The credibility findings that form the basis of Judge Gossett's reasonable suspicion ruling deserve deference, *Ornelas*, 517 U.S. at 699, and leave nothing on

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[8]The government resists the characterization of Judge Gossett's findings as credibility findings, asserting that "petitioner's counsel did not argue that Struble's testimony should not be credited." Resp't Br. 46 n.28. This assertion is inaccurate. Defense counsel repeatedly challenged Officer Struble's credibility. J.A. 37, 54, 60-64, 66, 84-89, 94-95. Judge Gossett's comments suggest that this is precisely why he did not believe Officer Struble about the factors relevant to reasonable suspicion. J.A. 95.

which a reviewing court could reach a contrary conclusion. Given that no reviewing court could find reasonable suspicion under these circumstances (or indeed, even under *de novo* review), the most appropriate resolution of this issue is for the Court to explicitly hold that the seizure for a dog sniff was not independently supported by reasonable suspicion. Mr. Rodriguez has already served nearly two years of his 60-month sentence after two years of litigation. J.A. 1, 7, 117. It would make little sense for the Court to order further litigation and invite further delay on a question that is easily determined within the confines of this record.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eighth Circuit and affirm the district court's finding of no reasonable suspicion.

Respectfully submitted,

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January 12, 2015

AMICUS CURIAE BRIEF

No. 13-9972

In the Supreme Court of the United States

DENNYS RODRIGUEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF ILLINOIS, ARIZONA, ARKANSAS, HAWAII, MICHIGAN, NEW MEXICO, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WISCONSIN, AND WYOMING IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The police officers of the States and their political subdivisions perform millions of traffic stops every year.[1] In 2013, over two million traffic stops occurred in Illinois alone.[2] The States use traffic stops to enforce traffic laws, to reduce accidents and their resulting fatalities and injuries, and as a tool to achieve other law enforcement goals, including drug interdiction.

While most traffic stops end safely for both officers and drivers, "traffic stops may be dangerous encounters." *Maryland v. Wilson*, 519 U.S. 408, 413 (1997). According to FBI statistics, more than sixteen percent of the 511 officers feloniously killed from 2004 through 2013 were killed during traffic stops or pursuits, and almost ten percent of the 573,456 assaults of police officers occurred during traffic stops and pursuits.[3]

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[1] Christine Eith and Matthew R. Durose, Contacts between Police and the Public, 2008, Table 2, at 3 (Bureau of Justice Statistics 2011) Available at www.bjs.gov/content/pub/pdf/cpp08.pdf (last visited, Decemeber 22, 2014).

[2] Illinois Traffic Stop Study, 2013 Annual Report, at 2. Available at http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2013/2013%20ITSS%20Executive%20Summary.pdf (last visited December 22, 2014).

[3] See http://www.fbi.gov/about-us/cjis/ucr/leoka/2013/figures/figure_-4-_-2013 (last visited

In applying the Fourth Amendment, courts review the reasonableness of officer conduct during lawfully initiated traffic stops under the totality of the circumstances. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In contrast, the bright-line rule petitioner advocates would categorically prohibit officers from extending a traffic stop, however briefly, after issuing a ticket or otherwise fulfilling the purpose of the stop. As a result, the actions of officers would be unduly restricted and would be increasingly subjected to second-guessing by courts. Such a shift would threaten officers' ability to enforce the law and would increase risks to their safety.

Moreover, this second-guessing of officers' conduct would inexorably extend backward to the very beginning of traffic stops. State courts, which handle the majority of prosecutions that result from traffic stops, would face a new wave of litigation seeking to suppress evidence based on when stops "should have" ended.

STATEMENT

1. Officer Struble, of the Valley Police Department in Nebraska, initiated a traffic stop after he observed petitioner's vehicle veer onto the shoulder before jerking back onto the highway. JA128. Upon Struble's request, petitioner provided his driver's license, registration, and proof of

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December 22, 2014).

insurance, but he did not make eye contact. *Ibid.* Struble asked petitioner to accompany him to the patrol car, but petitioner declined. *Ibid.* After checking petitioner's records, Struble asked the passenger in the vehicle for his identification and also asked where they had been. *Ibid.* The passenger indicated they were returning to Norfolk, Nebraska from Omaha after shopping for a used car. JA128-29.

2. Struble, who was accompanied only by his K-9 dog, Floyd, completed a records check of the passenger and called for backup. JA129. Struble issued a written warning to petitioner, and then asked for permission to walk his dog around petitioner's vehicle. *Ibid.* When petitioner refused consent, Struble instructed him to exit the vehicle and stand in front of the patrol car. *Ibid.* Five or six minutes later, a deputy sheriff arrived, and a minute after that Struble walked the dog around petitioner's car. *Ibid.* The dog alerted halfway through the second pass, approximately seven or eight minutes after Struble issued the written warning, and a search of the car's interior revealed a large bag of methamphetamine. *Ibid.*

3. Petitioner entered into a conditional plea of guilty to one count of possessing with intent to distribute methamphetamine after the district court denied his motion to suppress. JA127, 129. On appeal, the Eighth Circuit affirmed the denial of the motion, explaining that a "de minimis" or "brief delay

to employ a dog does not unreasonably prolong the stop," and "we have repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded." JA130-31 (citing *United States v. Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006) (four-minute delay upheld); *United States v. Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (two-minute delay upheld); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-49 (8th Cir. 1999) (dog sniff occurred before ticket issued and lasted less than two minutes)).

SUMMARY OF ARGUMENT

"As the text indicates and [this Court has] repeatedly affirmed, the ultimate touchstone of the Fourth Amendment is reasonableness." *Heien v. North Carolina*, 574 U.S. __ (2014) (slip op. at 5) (internal quotation marks omitted). A traffic stop is a Fourth Amendment seizure, *ibid.*, and this Court reviews the reasonableness of officer conduct during stops under the totality of the circumstances, see *Robinette*, 519 U.S. at 39. Petitioner, however, seeks a new and unprecedented bright-line rule that prohibits even a momentary extension of a traffic stop after the officer issues a ticket or otherwise resolves the purpose of the stop. But this Court has "consistently eschewed bright-line rules" in evaluating reasonableness under the Fourth Amendment, *id.* at 38-39, and has rejected petitioner's primary argument, Pet. Br. at 22, that

relying on the totality of the circumstances is "standardless," see *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985); *id.* at 695 (Marshall, J., concurring in judgment).

Petitioner mistakenly describes his time waiting for the backup to arrive as "post-stop." See, e.g., Pet. Br. at 2, 11, 26. Traffic stops, however, generally end only when officers communicate to drivers that they are free to go, *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), and petitioner was not told he was free to go before the dog sniff. Petitioner's error highlights the kind of hindsight analysis required under his bright-line rule. That rule would prohibit any extension of the stop "when the tasks related to the traffic infraction were (*or should have been*) completed." Pet. Br. at 19 (emphasis added). Petitioner's rule would encourage an officer to first address tasks unrelated to the stop's purpose, would require courts to second-guess the entire stop, and would likely lead to a flood of litigation.

Worse still, petitioner reads reasonableness out of the Fourth Amendment, misreads *Illinois v. Caballes*, 543 U.S. 405 (2005), and resurrects arguments against dog sniffs that this Court has rejected. See Pet. Br. at 17. Finally, petitioner's bright-line rule is incompatible with the different practical situations in the States and their counties. For instance, in sparsely populated counties that are high-intensity drug trafficking areas, pressuring

officers not to call for backup will both imperil those who perform dog sniffs, without backup, and lead other officers to forego permissible and effective law enforcement techniques.

ARGUMENT

I. The Reasonableness Of A Traffic Stop Should Be Determined By The Totality Of The Circumstances, Not A Bright-Line Rule Regarding The Stop's "End."

A. The totality of the circumstances has long been the only standard for the reasonableness of a seizure.

Petitioner invites this Court to ignore the long-established rule that the reasonableness of a seizure is best determined by examination of the totality of the circumstances. The Fourth Amendment "is not, of course, a guarantee against *all* searches and seizures, but only against unreasonable searches and seizures." *Sharpe*, 470 U.S. at 682 (emphasis in original). Because a traffic stop is a seizure, a police officer must have reasonable suspicion or probable cause to initiate it. *Navarette v. California*, 134 S. Ct. 1683, 1687-88 (2014). Here, there is no dispute that Officer Struble acted properly when he pulled petitioner over, collected petitioner's information, and issued a written warning. At issue is whether Struble's subsequent, brief extension of the stop—

while he waited for backup to arrive so he could walk the dog around the car—unreasonably prolonged it.

Petitioner, however, rejects this Court's well-established teaching that reasonableness is evaluated by looking to the totality of the circumstances. Rather than argue that under the totality of circumstances, extending the stop was unreasonable, petitioner instead seeks a bright-line rule categorically prohibiting police from extending a traffic stop after issuing a ticket or otherwise fulfilling the purpose of the stop. Pet. Br. at 15-22. This approach is unprecedented and unworkable.

Indeed, petitioner's rule is inconsistent with the text of the Fourth Amendment and this Court's precedents. "[T]he 'touchstone of the Fourth Amendment is reasonableness.'" *Robinette*, 519 U.S. at 39 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). And reasonableness turns on "the totality of the circumstances," *ibid*, as "the facts of cases [are] so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case." *United States v. Banks*, 540 U.S. 31, 36 (2003). Conversely, this Court has deliberately and "consistently eschewed bright-line rules." *Robinette*, 519 U.S. at 39. For instance, *Robinette* rejected a bright-line rule that after fulfilling the purpose of traffic stops, police officers must inform drivers that they are free to go before

asking for consent to search their cars. *Id.* at 36, 39-40.

Moreover, petitioner's primary argument for a bright-line rule and against the totality of the circumstances approach has already been rejected. He straightforwardly resurrects Justice Marshall's opinion concurring in the judgment in *Sharpe*, 470 U.S. at 695. There, Justice Marshall argued that reasonableness under the totality of the circumstances is "'a standardless yardstick,'" and petitioner adds the rhetorical flourish of "slippery slope" and "horseshoe rule" metaphors. Pet. Br. at 22 (quoting *Sharpe*, 470 U.S. at 695 (Marshall, J., concurring in the judgment)). But the *Sharpe* majority was unpersuaded by Justice Marshall's concerns and deliberately chose to measure police performance as a whole, recognizing that "[m]uch as a 'bright line' rule would be desirable, in evaluating whether" a seizure "is unreasonable, common sense and ordinary human experience must govern over rigid criteria." 470 U.S. at 685-87.[4]

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[4] *Dunaway v. New York*, 442 U.S. 200 (1979), cited by petitioner at pp. 21-22, does not support a bright-line rule here. That case holds that for police to take people into custody and transport them to the station for interrogation, they need probable cause, and reasonable suspicion is insufficient. 442 U.S. at 212-14. That was the extent of *Dunaway*'s "bright-line rule." Whether probable cause existed would still be measured by the totality of the circumstances, as would whether there was an arrest, and any arrest would still be assessed for

Further, petitioner's bright-line rule is logically inconsistent with using the totality of the circumstances to evaluate activity that prolongs a traffic stop where that activity takes place *before* the purpose of the stop is satisfied. Petitioner concedes that some activity unrelated to the stop's purpose is permissible during the stop, Pet. Br. at 25-26, thus, suggesting that his bright-line rule would not apply

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reasonableness. *Sharpe* already determined that *Dunaway* is "inapposite" when the issue is "the length of the defendant's detention" and does not support a bright-line rule in that context. 470 U.S. at 684.

Bailey v. United States, 133 S. Ct. 1031 (2013), cited by petitioner at pp. 22-23, dealt with an exception to the rule requiring probable cause for seizures, addressing the ability of officers to detain people incident to a search without any particularized suspicion of those detained. See 133 S. Ct. at 1037-38 (the "exception[] * * * does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers"); see also *id.* at 1042 ("this exception grants substantial authority to police officers to detain outside of the traditional rules of the Fourth Amendment"). Here, there is no dispute that the officer had probable cause to initiate the seizure. The dispute is whether the officer conducted the seizure reasonably. There is no exception around which to draw a bright line. *Arizona v. Gant*, 556 U.S. 332 (2009), and *Riley v. California*, 134 S. Ct. 2473 (2014), cited by petitioner at pp. 30-31, also dealt with an exception— searches incident to arrests—but again there is no exception here.

to such activity. In other words, if two stops with the same original purpose take the same amount of time, one might be considered reasonable when unrelated activity occurs before the ticket issues but the other considered unreasonable when the activity comes afterward. It is logically inconsistent to reach different results in those cases. Yet petitioner's bright-line rule does just that.

B. The time waiting for backup was not "post-stop."

Petitioner repeatedly describes his time waiting for the backup to arrive as "post-stop," or "after the stop [was] over," See, e.g., Pet. Br. at 2, 11, 26, while elsewhere referring to his stop as "prolonged," *Id.* at 12, 29. Only the latter accurately states the law. *Johnson*, 555 U.S. at 333, makes clear that a stop generally ends not when officers complete the necessary tasks but "when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." See also *id.* at 333-34 ("a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will," and nothing "occurred in this case that would have conveyed to [the driver] that * * * prior to the frisk, the traffic stop had ended or that he was otherwise free 'to depart without police

permission'" (quoting *Brendlin v. California*, 551 U.S. 249, 257 (2007)). [5]

The distinction is important. Petitioner's bright-line rule depends on the assertion that after "the tasks related to the purpose of the traffic stop have been completed," "a motorist is in the same legal position as a citizen walking on a public sidewalk or waiting for a flight at an airport." Pet. Br. at 13. But that premise is faulty, as the motorist has already been seized in a lawfully initiated traffic stop. Similarly, petitioner's attempt to distinguish between the public interest "during" and "after" the stop, Pet. Br. at 24-26, is a futile exercise because there is no "before" or "after." There is only one seizure. The questions are whether that seizure has been unreasonably prolonged and whether to

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[5] The cases cited by petitioner generally are consistent with the rule that the seizure ends when a reasonable person would feel free to leave. *See Unites States v. Meikle*, 407 F.3d 670, 671-73 (4th Cir. 2005) (stop completed when officer returned license, issued warning, shook driver's hand, and driver walked away toward the car); *United States v. Wilson*, 413 F.3d 382, 384, 387 (3d Cir. 2005) (officer returned documents, issued citation, told driver he was free to leave, and driver began walking back to car). Moreover, cases addressing whether a driver should have felt free to leave, rendering further interaction between the officer and driver consensual, may use the issuance of a ticket and the return of a license as evidence, but they are inapposite here. There is no dispute in this case that petitioner *did not* feel free to leave. See Pet. Br. at 6.

evaluate its length through a bright-line rule or by the totality of the circumstances.

C. Petitioner's bright-line rule would lead to increased litigation, perverse incentives, and second-guessing.

Petitioner asserts, without support, that his bright-line rule would be "easily administered," Pet. Br. at 30-32, but it would not be. First, the rule would apply not just to the issuance of a ticket, but to any point when "the tasks related to the reason for the stop are complete." Pet. Br. at 2. That could include when the reasonable suspicion or probable cause that justified a stop dissipates, a moment that can be difficult to isolate. And the rule's logic would apply not just to dog sniffs but to all police conduct that might prolong a stop. See, e.g., *Illinois v. Cummings*, 6 N.E.3d 725, 731-33 (Ill. 2014) (holding that officer violated Fourth Amendment by asking for driver's license when stop was justified by outstanding arrest warrant for vehicle's registered owner, a woman, and driver was a man), pet'n for cert. pending, No. 14-209; *United States v. De La Cruz*, 703 F.3d 1193, 1196-99 (10th Cir. 2013) (striking down request for identification by federal agents who believed, but were not "a hundred percent sure," that person stopped was not who they were looking for, because once "reasonable suspicion has been dispelled, even a very brief extension of the detention without consent or reasonable suspicion

violates the Fourth Amendment") (internal quotation marks and brackets omitted).

Second, traffic stops can be complicated scenes, and police generally perform dog sniffs with multiple officers present. One officer may perform a dog sniff while another works on issuing a ticket and returning documents. A dog sniff may begin before an officer issues a ticket, while the dog alerts seconds after the officer issues the ticket. Determining the precise sequence of events will not always be easy. Moreover, petitioner's rule would encourage an officer to first ask unrelated questions and engage in activity unrelated to the stop's purpose, possibly leading to longer traffic stops, and potentially leaving the original purpose unresolved if, for example, the officer were called away for a separate emergency.

Third, because an officer can wait to issue a ticket until after the sniff is performed, the rule will only work if a court also determines whether an officer "could have" issued the ticket earlier. Petitioner seeks this precise outcome, asking that courts "determine when the tasks related to the traffic infraction were (or should have been) completed." Pet. Br. at 19. As a result, not only will state (and federal) courts face even more motions to suppress evidence from traffic stops, but courts will find themselves engaged in complex hindsight analysis. If an officer engages the driver in

questioning unrelated to the stop's justification, like the trip's destination and purpose, for example, a court would have to decide when the stop "should have" ended. See, e.g., *State v Louthan*, 744 N.W.2d 454, 462 (Neb. 2008) (finding Fourth Amendment violation when backup arrived as officer confirmed driver had valid license and no outstanding arrest warrants, but sniff began before officer resolved issues that justified stop: expired license plate and turning without signaling). Yet this Court has made clear that such "second-guessing" of officers' actions is inappropriate. See *Sharpe*, 470 U.S. at 686. This Court should reject a rule that will lead courts to review every moment of every challenged traffic stop to determine whether the officer's conduct was strictly necessary.

D. Petitioner reads reasonableness out of *Caballes*.

Caballes held that a traffic stop not "prolonged beyond the time *reasonably* required to complete [its] mission" did not violate the Fourth Amendment by including a dog sniff, even without independent suspicion of drug activity. 543 U.S. at 407 (emphasis added). Petitioner's reading of the case removes a key word: reasonably. See Pet. Br. at 17 (citing *Caballes* for the proposition that "[b]ecause addressing that infraction is the purpose of the stop, the stop must last no longer than necessary to effectuate that purpose."). Only by ignoring the role

reasonableness played in the *Caballes* analysis can petitioner claim that the case supports his position.

Petitioner also mistakenly portrays "the sniff in *Caballes*" as "a seamless event," Pet. Br. at 27 (internal quotation marks omitted), ignoring both the facts of that case and the realities of traffic stops generally. In *Caballes*, this Court "accepted the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." 543 U.S. at 408. There, the officer pulled Caballes over for speeding. See *People v. Caballes*, 802 N.E.2d 202, 203 (Ill. 2003), rev'd 543 U.S. 405 (2005). After telling Caballes that he would receive only a warning ticket and confirming that Caballes had a valid driver's license, the officer asked "for permission to search his vehicle" and asked "if he had ever been arrested." *Ibid.* While writing the ticket, the officer "was interrupted by another officer calling him over the radio on an unrelated matter"—and then the canine sniff team arrived. *Ibid.* This stop thus would likely fail petitioner's bright-line rule because it "should have ended" after the officer informed the driver he would receive a warning ticket. Yet this Court upheld it. *Caballes* supports petitioner only when its facts and reasoning are ignored.

E. The Eighth Circuit properly assesses a stop's reasonableness under the totality of the circumstances while recognizing the issuance of a ticket as a significant fact.

Contrary to petitioner's argument, the Eighth Circuit did not authorize de minimis Fourth Amendment violations. Instead, it recognized that a stop reasonable under the totality of the circumstances does not always become unreasonable solely because of a brief, or de minimis, extension of time to perform a dog sniff (or any other activity unrelated to the stop's purpose), whether before or after the officer issues a ticket. See *$404,905.00*, 182 F.3d at 649 ("when a police officer makes a traffic stop and has at his immediate disposal the canine resources to employ this uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior").

$404,905.00 was the "genesis of the" Eighth Circuit's "de minimis" terminology. See Pet. Br. at 16 n.6. There, the officer pulled over a truck and U-Haul trailer for speeding, and completed license and vehicle checks in five to eight minutes. 182 F.3d at 646. The officer informed the driver that he would return the documents after completing a dog sniff, during which the dog alerted in under two minutes. *Ibid.* The Eighth Circuit "believe[d] the Supreme

Court would not closely examine the time it takes a traffic officer to complete the traffic stop itself, consistent with the discretion given arresting officers in other contexts." *Id.* at 648. "But once the officer decides to let a routine traffic offender depart with a ticket, a warning or an all clear," the Fourth Amendment "limit[s] any subsequent detention." *Ibid.* Further, it was "realistic to conclude the traffic stop was complete when Officer Ward told [the driver] his documents would be returned after the canine sniff." *Id.* at 649. Yet extending the sniff for between thirty seconds to two minutes after that was reasonable for two reasons: (1) the line was "quite artificial," and (2) the officer's "conduct on the whole was not constitutionally unreasonable," particularly considering the driver "subjected himself and his vehicle to a period of official detention that might have substantially exceeded the five to eight minutes." *Ibid.*; see also *Alexander*, 448 F.3d at 1017 ("It is precisely this reasonableness inquiry that led us to recognize in *$404,905.00* that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior.").

The Eighth Circuit thus assessed the stop as a whole, recognized that demarcating the moment a stop "ends" is artificial and not determinative, but acknowledged that the issuance of a ticket is a significant fact. This test maintains assessing the

stop as a whole while providing a special significance to the fact of the issuance of a ticket, which can heavily influence drivers' reasonable expectations. While the application of the test to facts may be questioned in any particular case, its fidelity to precedent and constitutional principles is sound.

II. Petitioner's Focus On Dog Sniffs Is Misguided.

Under petitioner's bright-line rule, apparently any extension of a stop past its "end" (or where it should have ended) violates the Fourth Amendment whether or not there was a dog sniff. See Pet. Br. at 2. Nevertheless, petitioner revives already-rejected arguments against dog sniffs that apply equally before or after the stop "ends."

Petitioner asserts "that drug detection canines are wrong nearly as often as they are right," Pet. Br. at 27, but cites no support in the record. See *Caballes*, 543 U.S. at 409 ("Although respondent argues that the error rates * * * call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument."). Instead, petitioner proffers publicly available data to show that not all searches based on dog sniffs lead to seized contraband. See Pet. Br. at 27-28. But this Court recently rejected reliance on such field data as the best measure of a dog's reliability. *Florida v. Harris*, 133 S. Ct. 1050, 1056 (2013) (noting that field

data understates false negatives and overstates false positives, and insisting on totality-of-circumstances approach to evaluating probable cause following dog alert).

In fact, searches based on dog sniffs are highly effective. The Arizona data petitioner cites demonstrates that searches based on canine sniffs lead to seizure of contraband more than almost any other search, including those based on items in an officer's plain view. Ariz. Dep't of Pub. Safety, *Traffic Stop Data Analysis Study: Year 3 Final Report* 125 & Figure 5.7 (University of Cincinnati Policing Institute ed., 2009).[6] The Illinois Department of Transportation Study petitioner cites indicated an even higher rate of seizing contraband. See Illinois Traffic Stop Study, 2013 Annual Report at 14.[7]

And while petitioner decries dog sniffs as harassing or humiliating, this Court has repeatedly held that they do not implicate legitimate Fourth Amendment interests. *Caballes*, 543 U.S. at 409 (citing *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 707 (1983)). Dog sniffs today are not more intimidating

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[6] Available at www.azdps.gov/About/Reports/docs/Traffic_Stop_Data_Report_2009.pdf (last visited December 22, 2014).

[7] Available at www.idot.state.il.us/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2013/2013%20ITSS%20Executive%20Summary.pdf (last visited December 22, 2014).

than they were ten or thirty years ago. To the contrary, dogs are more present now for security purposes, such as in airports and government buildings. Petitioner offers no reason for this Court to revisit its rulings on dog sniffs.

III. The Bright-Line Rule Is Incompatible With Maintaining Officer Safety And Law Enforcement Across States And Counties With Vastly Differing Characteristics.

Petitioner's bright-line rule would require a court to review a traffic stop and determine if it "last[ed] no longer than necessary to effectuate [its] purpose." Pet. Br. at 9. Among other problems, this approach ignores the reality that traffic stops are not uniform procedures replicated in laboratory environments, but often are "swiftly developing situation[s]." See *Sharpe*, 470 U.S. at 686. If courts analyze traffic stops as petitioner requests, officers' ability to enforce the law and protect themselves could suffer.

This case is instructive because Officer Struble was waiting not for a canine team—the dog, Floyd, was in his car—but for backup. JA128-29. Backup is often necessary for officer safety as "traffic stops may be dangerous encounters." *Wilson*, 519 U.S. at 413; see also *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("recogniz[ing] the inordinate risk confronting an officer as he approaches a person seated in an automobile"). According to FBI statistics, over

sixteen percent of the 511 officers feloniously killed from 2004 through 2013 were killed during traffic stops or pursuits, and almost ten percent of the 573,456 assaults of police officers occurred during traffic stops and pursuits.[8] Indeed, the Federal Law Enforcement Training Center and the International Association of Chiefs of Police recommend that officers request backup, if available, every time they decide to initiate a stop. Learning for Life Law Enforcement Explorer Traffic Stop Study Guide 2010.[9]

But the proximity and availability of backup will vary widely because States and counties have widely varying sizes and population densities. In Illinois, Cook County covers a geographic area a little over two and a half times that of Pope County and has a hundred and twenty-one times more people.[10] In Texas, Harris County is less than half the size of Culberson County but has over 19,000

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[8] See www.fbi.gov/about-us/cjis/ucr/leoka/2013/figures/figure_-4-_-2013 (last visited December 22, 2014).

[9] Available at www.tleeaa.org/uploads/Law-Enforcement-Exploring-Study-Guides-Full-Set.pdf (last visited December 22, 2014).

[10] Data available at http://quickfacts.census.gov/qfd/states/17/17031.html and http://quickfacts.census.gov/qfd/states/17/17151.html (last visited December 22, 2014)

times more people.[11] In California, San Francisco County has 17,179 people per square mile, but nine counties (Plumas, Siskiyou, Mono, Trinity, Sierra, Modoc, Inyo, and Alpine), have eight or fewer people per square mile.[12] In such rural areas, backup may simply need time to arrive. Drug trafficking, of course, is not restricted to areas of high population density. Indeed, Culberson County, Texas, and Siskiyou and Trinity Counties, California, are high intensity drug trafficking areas (HIDTAs). See White House Map of HIDTAs.[13] Other HIDTAs include Morton and Richland County, North Dakota, which have 14.3 people and 11.4 people per square mile, and Malheur County, Oregon, which has 3.2 people per square mile.[14] See also Lisa R. Pruitt, The Forgotten Fifth: Rural Youth and Substance Abuse,

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[11] Data available at http://quickfacts.census.gov/qfd/states/48/48201.html and http://quickfacts.census.gov/qfd/states/48/48109.html (last visited December 22, 2014).

[12] See Table 2 of California Census 2010, available at www.dof.ca.gov/research/demographic/state_census_data_center/census_2010/ (last visited December 22, 2014).

[13] Available at www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/hidta_map_24x36_2014.pdf (last visited December 22, 2014).

[14] See http://quickfacts.census.gov/qfd/states/38/38059.html; http://quickfacts.census.gov/qfd/states/38/38077.html; http://quickfacts.census.gov/qfd/states/41/41045.html (last visited December 22, 2014)

20 Stan. L. & Pol'y Rev. 359 (2009) (discussing drug abuse in rural communities and "the physical distances rural law enforcement officers must cover [that] necessarily limit what they are able to do").

A bright-line rule that requires second-guessing every traffic stop will require a court, for instance, to determine whether an officer "really needed" backup to resolve the purpose of the stop or whether the backup "really needed" the time it took to arrive. This pressure will encourage some officers to perform law enforcement activity, including dog sniffs, without backup, increasing the risks to those officers, and will discourage other officers from using such permissible and effective law enforcement techniques at all.

* * *

For all these reasons, this Court has wisely opted to review reasonableness under the totality of the circumstances and declined post hoc second-guessing. It should not reverse course now.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 13-9972

IN THE

Supreme Court of the United States

DENNYS RODRIGUEZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Free Speech Defense and Education Fund, Free Speech Coalition, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, and DownsizeDC.org in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

U.S. Justice Foundation, Gun Owners Foundation, Free Speech Defense and Education Fund, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, Policy Analysis Center, and Downsize DC Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., Free Speech Coalition, The Abraham Lincoln Foundation for Public Policy Research, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Each organization has filed many *amicus curiae* briefs in this and other courts.[2]

STATEMENT

In back-to-back terms in 2012 and 2013, this Court ruled, and then confirmed, that the Fourth Amendment is fundamentally "property-based," not privacy driven. In United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012), the Chief Justice and Justices Kennedy, Thomas, and Sotomayor joined Justice Scalia's opinion that, without a warrant, the government installation of a GPS tracking device on the undercarriage of a person's automobile is an unconstitutional search regardless of whether such installation invaded the owner's "reasonable expectation of privacy [under] *Katz*."[3] *Id.* at 948-950. Then in Florida v. Jardines, 569 U.S. ___, 133 S. Ct. 1409 (2013), Justice Scalia — this time joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan — ruled that a warrantless search of the curtilage of a house by a "drug-sniffing" dog violates the Fourth

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[2] These *amici* filed *amicus curiae* briefs in several Fourth Amendment cases (*see* n.6, *infra*), most importantly, in the case of United States v. Jones. http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf, which is discussed in H. Titus and W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment." 3. J. OF LAW, TECHNOLOGY & THE INTERNET, no. 2 (Spring 2012), pp. 243-264. http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf

[3] Katz v. United States, 389 U.S. 347 (1967).

Amendment regardless of whether "the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*." *Id.* at 1417.

Together, the Jones and Jardines majorities comprise seven of the nine sitting justices who agree that the primary protection provided by the Fourth Amendment is property-based, not privacy-driven. Irrespective of the conclusions reached in each case, these seven justices adopted the view that "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test" (Jones at 952), as derived from the original Fourth Amendment text and its historical context. *See* Jones at 917-18. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." Jones at 950. *See also* Jardines at 1413-14. Additionally, all seven justices agreed that the reasonable-expectation-of-privacy test cannot be applied so as to circumvent the Fourth Amendment's primary purpose of protecting private property rights. *See* Jones at 951 ("*Katz* ... did not 'snuf[f] out the previously recognized protection for property....' *Katz* did not narrow the Fourth Amendment's scope."); *see also* Jardines at 1417 ("'Fourth Amendment rights do not rise or fall with the *Katz* formulation.'").

Jones and Jardines reaffirmed property's paramount place in the Court's Fourth Amendment jurisprudence and described the relationship between property and privacy in application of that amendment. By strictly subordinating privacy

considerations to property principles in both Jones and Jardines, the Court rejected Justice William J. Brennan's opinion that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *See* Warden v. Hayden, 387 U.S. 294, 304 (1967). In Jones the Court explicitly rejected the notion that the Katz "reasonable-expectation-of-privacy test" was to be "appl[ied] *exclusively*" in Fourth Amendment cases — "even when applying the privacy test eliminates rights that previously existed." Jones *id.* at 953. By recognizing that the privacy test, in fact, could derogate existing rights, the Court also rejected Justice Brennan's cavalier acceptance of the likelihood that abandoning established property-based rules would "enlarge the area of permissible searches." Hayden at 309. To the contrary, both Jones and Jardines dispel any notion that failure to satisfy the reasonable-expectation-of-privacy test conclusively determines compliance with the Fourth Amendment. *See* Jones at 950 and Jardines at 1417.

While Jones signaled this Court's retreat from its practice of relying almost exclusively upon the privacy test (*see* Jones at 949-52), the entrenched Hayden/Katz rule continues to dominate this Court's jurisprudence. *See, e.g.*, Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2484 (2014). One would have expected to see a resurgence of property-based arguments in Fourth Amendment cases reaching this Court after Jones and Jardines; however, that has not been the case. *See, e.g.*, Heien v. North Carolina, Docket No. 13-604. Both at the petition stage, and at the merits stage, litigants before this Court appear to be trapped in the past, relying exclusively upon the Katz privacy test without

first addressing the property principles articulated and applied in Jones and Jardines. *Compare, e.g.*, Heien Brief for Petitioner[4] *with* Heien brief *amicus curiae* of Gun Owners Foundation, *et al.*[5] After all, if the Katz test is truly an "add-on," as both Jones and Jardines say it is, the question should be, **first and foremost**, whether the "property-rights baseline" has been violated. As Justice Scalia noted in Jardines, that "baseline ... keeps easy cases easy." *See* Jardines at 1417. Unfortunately, that has not turned out to be the case.

In his brief, Petitioner repeatedly urged this court to adopt a "bright-line rule" to govern such cases. Pet. Br. at 9-11, 15-16, 21, 23, 30-31. To assist in that effort, as these same *amici* have done in several recent cases,[6] this brief strives to provide the Court with a

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[4] http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-604_pet.authcheckdam.pdf.

[5] http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf.

[6] *See amici curiae briefs of*: Gun Owners Foundation, *et al.* Heien v. North Carolina, Docket No. 13-604, June 16, 2014 (traffic stop based upon mistake of law), http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf; Downsize D.C. Foundation, *et al.* U.S. v. Wurie, Docket No. 13-212, April 9, 2014 (searches of cell phones incident to arrest), http://www.lawandfreedom.com/site/constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf; U.S. Justice Foundation, *et al.* Quinn v. Texas, Docket No. 13-765, January 27, 2014 (no-knock warrants), http://www.lawandfreedom.com/site/firearms/Quinn%20v%20Texas%20amicus%20brief.pdf; U.S. Border Control, *et al.* Cotterman v. U.S., Docket No. 13-186, Sept. 9, 2013

faithful application of the Fourth Amendment property principles articulated in Jones, to the circumstances of the present case.

SUMMARY OF ARGUMENT

In 2012 in United States v. Jones, this Court restored its Fourth Amendment jurisprudence to its original property rights base. Relying on the Amendment's text which protects the property rights of the people in their "persons, houses, papers, and effects," the Jones Court established that first and foremost the Fourth Amendment ban on unreasonable searches and seizures protected the people's fixed property rights and, only secondarily, their privacy. One year later, this Court reaffirmed Jones in Jardines v. Florida (2013), explaining that the Fourth Amendment's protection of property rights was the constitutional "baseline," which could be augmented by privacy expectations, but not diminished.

Together, Jones and Jardines signaled a change in Fourth Amendment analysis, calling initially for an inquiry into whether a contested government intrusion constitutes a violation of property rights and, only if not, then secondarily an inquiry into whether the intrusion at issue violated one's reasonable expectation of privacy. Unless the first inquiry is made, there can be no assurance that the property baseline has been met and, therefore, whether the privacy expectation

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(suspicionless border searches), http://lawandfreedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf.

adds to, rather than subtracts from, the property rights secured by the Fourth Amendment.

In this case, the courts below erroneously bypassed the property inquiry, asking only whether an eight-minute delay after the completion of a traffic stop was a "de minimis" intrusion upon the driver's reasonable expectation of privacy. Had the threshold property question been addressed, the courts would have found that Rodriguez's common law property right in his **person** was violated because the intruding officer unlawfully detained Rodriguez after completion of the initially valid traffic stop. According to the rule in Jones, Rodriguez was denied the "*minimum* ... degree of protection ... afforded [by the Fourth Amendment] when it was adopted." *Id.* at 953.

Additionally, disregarding Jardines, the courts below failed to inquire whether an unconsented-to search of an unlawfully seized vehicle by a drug sniffing dog constitutes an unlawful physical intrusion upon Rodriguez's undisputable, constitutionally protected Fourth Amendment property rights in his vehicle, as recognized in Jones. However, as this Court recognized in Jardines, an intrusion of a trained drug sniffing dog in the immediate area surrounding one's house is no ordinary event. Likewise, siccing such a dog upon the exterior surface of one's "effects," on the basis of mere suspicion, falls far short of the probable cause protection afforded Rodriguez's property rights.

ARGUMENT

I. THE COURTS BELOW FAILED TO COMPLY WITH THE BASELINE PROPERTY PRINCIPLE ESTABLISHED IN JONES AND JARDINES.

A. The Property Right Baseline Restated.

As stated in Jones, the Fourth Amendment first and foremost protects fixed individual property rights from government intrusion and, only secondarily, protects evolving privacy considerations. *Id.* at 949-51. As stated in Jardines, protection of property rights is the established Fourth Amendment "baseline," limiting government intrusions regardless of any expectation of privacy — reasonable or otherwise. *Id.* at 1414-17. Thus, in both Jones and Jardines, this Court addressed whether the government intrusions — the fastening of a GPS tracking device on Jones' car, and the introduction of a "trained police dog to explore the area around [Jardines'] home" respectively — compromised any Fourth Amendment property right in "persons, houses, papers, [or] effects." *See* Jones at 949 and Jardines at 1416.

In Jones, tracking the Amendment's text, the Court found first that Jones' vehicle on which the government had installed the GPS tracking device was an "effect." *Id.* at 949. It then found that implanting the device was a "physical intrusion" protected by the Fourth Amendment because it violated Jones's right to exclusive possession, even though the implantation did no damage whatsoever to Jones's vehicle. *Id.* The

Court rejected the government's contention that "no search occurred here, since Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads." *Id.* at 950. The Court did so, not on the ground that Jones had a reasonable expectation of privacy, but on the ground that "Jones's Fourth Amendment rights [did] not rise or fall with the *Katz* formulation." *Id.*

Likewise, in Jardines, the Court determined that the government officials with their drug-sniffing dog were gathering information by intrusion upon the curtilage of Jardines' house, a Fourth Amendment protected property right, traceable it all the way back to Blackstone's Commentaries. *Id.* at 1414-15. After finding that the area searched by the government and its dog was "constitutionally protected," the Court asked "whether [the search] was accomplished through an unlicensed physical intrusion." *Id.* at 1415. The Court found that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" did not come within the customary permissive license accorded to persons coming to the front door of a home, particularly because the intrusion had not been consented to. *Id.* at 1415-17.

Even so, the government argued further that "investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest," citing three Supreme Court precedents in which the Court had concluded that, under similar facts, the government intrusion did "not violate the 'reasonable

expectation of privacy' described in *Katz.*" *Id.* at 1417. Relying solely upon Jones, the Court determined that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*," since the property law baseline had been breached by the physical intrusion upon Jardines' house in violation of the Fourth Amendment. Jardines at 1417.

B. The Property Baseline Precludes the *De Minimis* Argument Here.

As it was in Jardines and Jones, so it is here. While driving his Mercury Mountaineer on a public highway, Dennys Rodriguez momentarily crossed the fog line, drifting off the roadway in violation of Nebraska law. Upon observing the violation, Officer Morgan Struble stopped Rodriguez's vehicle. Although he became suspicious that Rodriguez and his passenger, Scott Pollman, were engaged in other wrongdoing, Officer Struble issued a warning ticket on the traffic violation, and returned all of the documents to the two men. However, instead of letting the men go on their way, Officer Struble asked Rodriguez whether he minded if a drug dog walked around Rodriguez's vehicle. Rodriguez declined. Continuing to rely on his initial authority to stop Rodriguez's vehicle, Struble ordered Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the police cruiser. *See* Brief for Petitioner ("Pet. Br.") at 2-6.

Apparently, Officer Struble's request for consent was no more than an empty formality as he wholly

disregarded Rodriguez's refusal. After a second officer arrived, Officer Struble led his dog to the passenger side of the vehicle where the dog alerted. The officer estimated that as much as eight minutes had transpired from the time that he issued the warning ticket and the dog alerted on the vehicle. *Id.* at 6.

Rodriguez does not dispute that the initial stop was lawful, but he does contend that he was unlawfully detained by Officer Struble after the warning ticket was issued. *Id.* at 7. While the period of detention following the issuance of the ticket was only eight minutes long, the officer physically intruded upon Rodriguez's inherent right of freedom of movement.[7] That right, in turn, is a property right vested in Rodriguez's "person" and, thus, is recognized by the original Fourth Amendment as one of four distinct protected property rights. *See* Jones at 949. As John Locke wrote in his Second Treatise of Government:

> every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body and the Work of his Hands ... are properly his. [J. Locke, Second Treatise of Government ("Second Treatise"), para. 27 (facsimile ed.), reprinted in J. Locke,

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[7] "Propriety is naturally antecedent to Government, which doth not give it ... Every man is born with a propriety in his own members...." Richard Baxter's *Holy Commonwealth*, quoted in J. Locke, Two Treatises of Government, p. 287, n. 27 (P. Laslett, ed., Cambridge Univ. Press: 2002).

> Two Treatises of Government, pp. 287-88 (P. Laslett, ed., Cambridge Univ. Press: 2002).]

"[B]eing the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." Locke's Second Treatise at para. 44. Thus, Stanford University historian and Pulitzer Prize winner Jack Rakove has written:

> For Locke, as for his American readers, the concept of property encompassed not only the objects a person owned but also the ability, indeed the right to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely claim their rights, but also owned them, and their **title to their liberty** was as sound as their title to the land or to the tools with which they earned their livelihood." [J. Rakove, Revolutionaries. A New History of the Invention of America, p. 78 (New York: 2010) (emphasis added).]

At common law, this property right in one's personal liberty was protected by an action for the injury of false imprisonment "by the loss of time and liberty." 3 W. Blackstone, Commentaries on the Laws of England 127 (Univ. Of Chi. Facsimile ed.: 1768).

> To constitute the injury of false imprisonment ... requi[res] [a] detention of the person; and ... [t]he unlawfulness of such detention. Every confinement of the person is

> an imprisonment.... **even by forcibly detaining one in the public streets.** Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise ... from some warrant from a legal officer.... [*Id.* (emphasis added).]

Applying these factors here, it is beyond dispute that, after Officer Struble issued the warning ticket, for the traffic violation, his authority to detain Rodriguez came to an end. *See* Pet. Br. at 12-13, 18-19. However, the court of appeals below ruled that the continuing detention of Rodriguez "constituted a *de minimis* intrusion on Rodriguez's personal liberty" and, therefore, was constitutionally "reasonable" under the Fourth Amendment.[8] United States v. Rodriguez, 741 F.3d 905, 908 (8th Cir. 2014). The court, in disregard of Rodriguez's property right in his person, reasoned that "a dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in **privacy**." *Id.* at 907 (emphasis added).

In so ruling, the court of appeals relied upon Illinois v. Caballes, 543 U.S. 405 (2005), an opinion

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[8] The error inherent in reducing the Fourth Amendment's protection down to a modern judge's subjective assessment of "reasonableness" was examined in an *amicus curiae* brief filed by Gun Owners Foundation, *et al.* in Heien v. North Carolina (July 16, 2014), pp. 5-17. http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf

handed down by this Court seven years before Jones. In Caballes, the Court restated the rule that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 407. Nevertheless, the Court concluded that the conduct of a drug sniff during a legitimate traffic stop was permissible because the sniff did not "infringe[] [any] protected interest in privacy" (*id.* at 408):

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. [*Id.*]

Under the property principle of Jones and Jardines, neither the ruling of the court of appeals below nor the Caballes precedent upon which the court below relied, can stand. Both rulings acknowledged that a lawful stop for a traffic violation becomes unlawful when continued after completion of that mission. Yet, both the court below and the Caballes Court found a dog sniff to be permissible on the ground that under the circumstances there was no privacy violation. Demonstrably, the Eighth Circuit's and this Court's reliance upon the Katz privacy test to justify a detention that violates the common law property right of freedom of movement undermines "the [minimum] degree of protection" of Rodriguez's person that the "18th-century guarantee against unreasonable searches ... afforded when [the Fourth Amendment] was adopted." Jones at 953.

Further, by applying the Katz privacy test, both opinions invite future courts to plunge "needlessly into additional thorny problems," as would have been the case in Jones. *See* Jones at 954. In Jones, this Court refused to be drawn into the "'vexing problems'" presented by the Katz test as applied to the totality of the circumstances without first determining whether the search or seizure at issue violated the property principle. *Id.* at 953. Likewise, here, there is no reason to harness the courts with the Katz test to sort out those equally "vexing problems" where the delay between a lawful stop and a dog sniff is *de minimis* in light of the totality of the circumstances.[9] *See* Pet. Br. at 22-23.

C. The Property Principle Precludes the Reasonable Suspicion Argument.

The Government attempts to block the clear pathway to a finding of a Fourth Amendment violation with an Eighth Circuit precedent which ruled that:

> once an officer finishes the[] [routine tasks involved in a traffic stop] "the purpose of the traffic stop is complete and further detention of the driver or vehicle would be unreasonable, 'unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention' ...." [United States v. Flores, 474 F.3d 1100, 1103 (8th Cir. 2007).]

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[9] *See, e.g.*, United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1990).

Accordingly, the government has contended that in the course of his effecting the traffic stop, Officer Struble observed several things that gave him an "articulable suspicion" that a crime was being committed — including use of air fresheners, extreme nervous behavior, and an unbelievable story. Brief of United States in Opposition at 11-14. On this ground, the government asserted that the deployment of the drug-sniffing dog was reasonable under the Fourth Amendment. *Id.* at 17.

Wholly missing from the government's analysis and any of the precedents upon which it relied is any consideration of the distinct property rights vested in Rodriguez's vehicle. Yet, as Jones ruled, "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." *Id.* at 949. And, as Jones also ruled, the planting of a GPS monitor on the undercarriage of Jones's vehicle was a physical intrusion upon Jones's property right in the vehicle. *Id.* at 949-50. Thus, Jones held that the government's trespassory action of placing the GPS tracking device triggered Fourth Amendment protection and, therefore, the warrant and probable cause requirements were not met. Likewise is the search of Rodriguez's vehicle by the deploying of a drug-sniffing dog. As Jones had a protected property right in his vehicle, including its undercarriage, so Rodriguez had a protected Fourth Amendment right in his vehicle and its exterior parts. And, as Jardines had a protected property right in the curtilage of his house, so Rodriguez had a protected property right in the immediate exterior area around his truck. As Jardines observed, it would be outside the custom of permitting

uninvited visitors to the front door of one's home to include the "introduc[tion] [of] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* at 1416. Likewise, it would be outside the custom of permitting the touching of one's vehicle for a law enforcement agent to parade a drug-sniffing dog around a vehicle stopped for violation of a traffic law. Even if it is believed that such a vehicle may be searched without a warrant under the so-called automobile exception, that exception does not dispense with the Fourth Amendment probable cause requirement. *See* C. Whitebread, Criminal Procedure § 7.02, pp. 142-44 (Foundation Press: 1980).

No doubt the government would argue that, unlike Jones, the dog sniff involved no physical intrusion upon Rodriguez's vehicle and, unlike Jardines, the sniff did not involve the police "physically entering and occupying" Rodriguez's property. Yet, while Rodriguez might not have "owned" the physical space on the side of the road, he was there only because the government forced him to stop there, something that no private citizen could do. The government might argue that, had Rodriguez been parked on the side of the street near his home, a private citizen could have walked his beagle by the car, and that dog might have taken a casual sniff as it passed. Of course, that is nothing like what happened here.

As this Court noted in Jardines, what is important is that the police do "'no more than any private citizen might do,'" such as through a "license ... implied from the habits of the country...." *Id.* at 1415-16. As

Jardines explained, while someone might bring his dog with him when he enters his neighbor's porch and knocks on his front door, that is completely different than "introducing a trained police dog to explore the area ... in hopes of discovering incriminating evidence." *Id.* at 1416. Likewise, here, while a dog on a walk might have sniffed Rodriguez's car, a thorough, careful sniff of his car by a drug dog is "something else. There is no customary invitation to do *that*." *See* Jardines at 1416. As pointed out in Petitioner's Brief, a sniff search can be a "humiliating," "frightening," and "intimidating" experience. Pet. Br. at 27.

Indeed, if anyone were to park his car to run a quick errand, and return to the car to find two men with a dog peering into the windows, the dog standing on its hind legs with its paws on the doors, examining every nook and cranny of the exterior of the vehicle, such behavior "would inspire most of us to — well, call the police."[10] *See* Jardines at 1416. Like Jardines,

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[10] Of course, the suspicionless dog sniff here was also an invasion of privacy. Concurring in Jardines, Justices Kagan, Ginsburg, and Sotomayor found that the drug dog sniff on Jardines' front porch also violated Jardines' reasonable expectation of privacy because of the "uncommon behavior" of the police as compared to ordinary members of the public, employing a "super-sensitive instrument" to acquire details about one's personal life that ordinary people neither know nor care to know. Here, like in Jardines, Officer Struble's "dog was not your neighbor's pet [walking by your car] on a leisurely stroll." *See* Jardines at 1418. Put simply, the suspicionless drug sniff here was a privacy violation because normal people and normal dogs do not act like that. As Justice Kagan wrote in Jardines, "Was this activity a trespass? Yes.... Was it also an invasion of privacy? Yes, that as well." *Id.*

"the background social norms that invite a [person to walk his dog on a sidewalk] do not invite him there to conduct a search." *Id.*

Of course, all of the above assumes that the drug sniffing dog never actually touched Rodriguez's car. That is likely not the case. In fact, it is routine procedure for drug-sniffing dogs to jump up and put their paws and noses all over a vehicle as they search it and, indeed, to sometimes claw at an item as an indicator of a "hit."[11] Surely this constitutes a physical intrusion, and a trespass, for "'no man can set his foot [or instruct his dog to set its foot] upon his neighbour's close without his leave; if he does he is a trespasser.'" *See* Jones at 949 (quoting Entick v. Carrington).

In short, the Jones and Jardines property principle precludes the government from justifying its dog-sniffing search of Rodriguez's vehicle regardless of whether Officer Struble had a reasonable suspicion of a drug crime, and even if based upon observations made during the time of a lawful traffic stop. If the dog-sniff constituted a trespass upon Rodriguez's vehicle — and it did — then, because the vehicle was a constitutionally protected "effect," it was protected from any search based upon anything less than probable cause.

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[11] http://www.youtube.com/watch?v=Dg4if0UpGo8 (at 0:40-0:55); http://www.youtube.com/watch?v=_HIw9XVLMDI (at 1:40 "and then at that point, the third indication is 'scratch.'"); http://www.youtube.com/watch?v=CO09LXMd-ps (at 0:23); http://www.youtube.com/watch?v=CzlGKvU1g80 (at 0:48, 3:03, 3:25, etc.)

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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